S. HRG. 100-384

PERSONAL SURETIES UNDER THE MILLER ACT: INADEQUATE PAYMENT PROTECTION FOR SMALL BUSINESS CONSTRUCTION SUBCONTRACTORS

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL SPENDING, BUDGET, AND ACCOUNTING

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

AUGUST 11, 1987

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PERSONAL SURETIES UNDER THE MILLER ACT: INADEQUATE PAYMENT PROTECTION FOR SMALL BUSINESS CONSTRUCTION SUBCONTRACTORS

TUESDAY, AUGUST 11, 1987

U.S. SENATE,
SUBCOMMITTEE ON FEDERAL SPENDING,
BUDGET, AND ACCOUNTING,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Tampa, FL.

The Subcommittee met, pursuant to notice, at 9 a.m., in suite 600, First Southern Plaza, Hon. Lawton Chiles, Chairman of the Subcommittee, presiding.

Present: Senator Chiles.

OPENING STATEMENT OF SENATOR CHILES

Senator CHILES. Good morning.

Today the Subcommittee on Federal Spending will hold a hearing on a particular problem area in Federal construction contracting. We will examine several abuses that have developed in the Personal Surety Program.

For its own protection the Federal Government requires a construction job be secured by corporate bonds or alternative forms of sureties.

Current regulations allow a contractor to pledge personal assets in lieu of a corporate bond. These regulations are drawn from the Miller Act, a law passed by Congress in 1935, before I got there.

The Miller Act was intended to increase competition for Federal projects. However, as we look at the provisions of that act in 1987, we find that the opposite effect has occurred. We will hear from witnesses today who will tell us that the Personal Surety Program has left their personal assets in total ruin.

Simply put, the Personal Surety Program is not working. The current Government regulations call for a check and balance system that balances out to no checks at all. The program goes astray because the value of assets pledged are certified by persons who may know the contractor, but do not know the true value of the assets.

This is because the Government allows almost any public official to certify the value of assets. That person can be a judge, clerk of a court, the U.S. Government which a contracting officer deems acceptable.

Now, let's just kind of look at what that means. A postmaster, for example, may be capable of running a postal district, arranging a mail system, or hiring persons to distribute mail. These duties do not necessarily enable him to judge the value of property or assign value to assets which may be pledged to cover a bond.

To ask that postmaster to confirm such value is foolish and it's costing subcontractors their livelihood when a project goes bust. Something is wrong with a system that trains a person in one set of duties, but allows him to perform other duties for which he is not qualified.

Under the Personal Surety Program, a signed certificate indicates that a contractor has personal assets to be used instead of bonds on a Federal job. He then takes that certificate to the contracting officer for the job. The contracting officer must determine that the proper persons have signed the certificate.

He must also assure himself that the value pledged is sufficient. However, like the Federal official who signed the certificate, the contacting officer is not usually trained to determined whether the property or other assets pledged are enough to cover the awarded contract.

We will hear testimony indicating it is far too easy and simply to obtain a signature on a certificate pledging personal assets, without the signatory knowing the value of the assets.

We will hear testimony which will illustrate how easy it is for a contractor to pledge property that may be held by several people, including himself.

Those are loopholes which can drive an innocent party, like an unsuspecting subcontractor, to bankruptcy. Those are loopholes which can drive away competition for Federal construction jobs. For many of the people who testify here today, closing those loopholes will not help them, personally. But if we are to increase competition and stop the abuses, closing those loopholes will be essential.

What happens to a subcontractor who goes caught in this quagmire? If that contractor is lucky, he or she may simply take a big loss. But if this happens to be a small contractor with a limited cash flow, the nightmare may just be beginning. That subcontractor must go to court and pay legal costs and other expenses, to obtain money that was justly and honestly earned.

If a subcontractor or a supplier on a Federal job fails to live up to the terms of the contract, the Government may default them for its own convenience. Today's testimony will show subcontractors do not have that same remedy. Although Federal officials may end up allowing fraudulent personal assets to be pledged, they bare no liability when a subcontractor or supplier goes bankrupt.

Ultimately, if the contractor defaults or fails to pay the bill, the subcontractors and suppliers are left holding an empty bag. The Government loses, too, because those subs and suppliers join those businesses least likely to do government work again.

The Personal Surety Program is not working for another reason. It enables a competitive advantage to those who use it in place of corporate bonding. Our witnesses will explain how that is happening, as well.

Let me add, we will be doing more than listening to problems. We will also be working on solutions. I have invited the Administrator of the White House Office of Federal Procurement Policy to join us today. He has got the kind of clout needed to change the system. He and I will be talking about what can be done and when it can be done.

Our first set of witnesses are Ms. Jackie Mobley, a credit manager of Eagle Supply Company of Tampa, FL; Larry Hughes, the President of Destin Cabinets from Destin, FL; John DeVolk, the Branch Credit Manager of Raybro Electric Supplies, Inc., up in Jacksonville, FL; and Carl A. Calvert of the law firm of Matthews, Crider, Calvert & Bingham, P.C. of Albuquerque, NM.

I want to suggest to you we take our testimony sworn. I would ask you to each raise your right hand.

[All witnesses sworn.]

Senator CHILES. You all recognize you're sworn.

And Ms. Mobley, we'll start with you.

TESTIMONY OF JACKIE MOBLEY, CREDIT MANAGER, EAGLE SUPPLY CO., TAMPA, FL; LARRY HUGHES, PRESIDENT, DESTIN CABINETS, DESTIN, FL; JOHN DeVOLK, BRANCH CREDIT MANAGER, RAYBRO ELECTRIC SUPPLIES, JACKSONVILLE, FL; AND CARL A. CALVERT, OF MATTHEWS, CRIDER, CALVERT & BINGHAM, P.C., ALBUQUERQUE, NM

Ms. MOBLEY. Good morning, Senator Chiles.

My name is Jackie Mobley. I'm Corporate Credit Manager for Eagle Supply here in Tampa, a roofing supply house for contractors throughout the State of Florida.

Back on October 19, 1984, we approved the sale of materials to Randall Construction, a roofing company, approved for the sale based on the belief there was a bond securing the material.

We shipped materials, worth over $170,000 from October 1983 until April 1984. We only collected $69,000 on contracts during that time.

In June 1984 after a futile effort to collect $100,000, we requested assistance from the Navy, and we were provided a copy of their payments which reflected that disbursement had been made to Randall Corporation totalling $504,000 of $543,000, owed.

At that point we were forced to seek legal assistance. Until March 1986, it took a total of 21 months to obtain a judgment against the four individuals who represented the joint venture.

By that time one of the individuals had filed personal bankruptcy, two more later filed bankruptcy. In other words, all of their personal records were confiscated in a separate action. I believe we mentioned that the two individuals who executed the personal sureties had purged their accounts and their two asset verifications had been certified by a former member of the firm which was also representing the insurance company Southern Bonding Corporation. Southern Bonding Corporation had advised us originally there was a corporate bond in process.

We had initially approved same. The other assets were certified by a bonding agent. I do not believe there was anytime to verify that statement.

We had been awarded a sum totalling $137,000, which constituted $101,000 in invoices, $23,500 in interest, $12,100 which would be incurred in legal fees.

To date we have recorded $18.93, our prorated portion of one of the individual bankruptcy payments.

Let me assure you in this matter we would never again act as a surety for a Federal contract. We will elect to pass on future contracts without significant change in this regulation.

Thank you.

Senator CHILES. Thank you. I'm going to let you all testify and ask you some questions.

Larry, would you give us your testimony.

Mr. HUGHES. Good morning, Senator Chiles.

My name is Larry Hughes. On October 5, 1981, I was president of Destin Cabinets.

I employ eight to ten on a regular basis, sometimes employees reach as high as 18 people.

We had a thriving business. It was a small business. The day I signed the contract should have been the happiest day of our lives.

I signed a contract to build 150 cabinets on an airforce base in Cocoa Beach, Florida. This was the largest Federal contract I ever had.

I thought this would help my business grow. Instead, this account with the Federal Government has ruined my business and brought me to the edge of bankruptcy.

My story started in October 2, 1981, in a Federal Government job bonded by a payment bond 25 days, which was signed on August 31, 1981 by Ralph Jackson and a Mr. Jim Baldock and D.J. Barclay were the surety people. They secured $1,852,000 to $953,800 which were backed by people in Kentucky. The surety was in fact farmland. Later we asked about the value of this farm land and the bankers laughed.

They said there was nothing there of that value and also some other things—I'm not good at this——

Senator CHILES. Take your time.

Mr. HUGHES. Anyway, we soon realized that personal jewelry, household and farm equipment, livestock, all these things were used on this bond, peoples' homes used as surety. And we found we were not secured, at all.

Anyway, the job started and the job was just total chaos at the beginning of it and all the way down to the end. During the middle of the job, most of the time people on the job were convinced that we were not going to be paid. We were afraid that there was no way back out of the job.

We were a small business. We were growing and this was the biggest job that would really get our business on the road. There were many times we went thoughout to the end of the 46 kitchens left to build and deliver on the job site.

The day that we were going to send them, we were going to get our money up front so we would not lose it. We delivered the cabinets. D.J. Barclay had the money down there and information and he handed the truck driver only a $1,000 check.

It should have been much, much more. Then we ordered the cabinets to Orlando to stay in storage. It stayed about a month and a half.

We called the Government, asked them, you know, what was going on. They said they didn't know. Finally Mr. Barclay started another contract and anyway, he did not—I'm not used to something like this—anyway, we went through a lot of hardship. We lost a lot of things when it got down to the end, some cars, trucks in our business or home and everything.

And I don't know where I was. I was so scared. Anyway, it took a great deal of lawyer's fees and attorneys fees to go through this and we never did get paid. And we went up to Kentucky to try to get our money and still now we have no money and are still in litigation.

We are not going to get our money. It's just not there.

Senator CHILES. How much money did you lose?

Mr. HUGHES. Well, we lost, I guess, around $150,000.

And to us that was a lot of money. It closed down our business and I lost the shop. I lost several personal things: Car, boat, the truck.

Senator CHILES. Did you get a judgment for the $150,000?

Mr. HUGHES. I only got a judgment for $42,000 and even when we tried to collect it we found the judgment was worthless. It was their personal mortgage on land and there was just nothing we could really get.

Senator CHILES. So the judgment for $42,000 you've not been able to collect.

Mr. HUGHES. We have been trying to collect that as of today and it just seems like a never ending battle.

We paid attorneys' fees to try to get this money.

Senator CHILES. Did the Government pay Barclay?

Mr. HUGHES. Yes, he got paid on Thanksgiving Day of, what, 1983.

And we thought we were going to be paid then. We had signed a new contract. But he never did pay us. The Government assured us we were going to get paid. But we never did.

Senator CHILES. They paid him. Even though you, again, were asking them to protect you for your monies, the Federal Government didn't see you got paid.

Mr. HUGHES. We asked several times for help. They never would speak with us. They could not help.

So we just more or less shut the doors to the shop and closed down. It took too long for litigation and we started losing too many things more or less.

Senator CHILES. I'll have some more questions to ask in a minute.

Mr. DEVOLK. Senator Chiles, I might add on Larry's behalf, he and I have been working very, very closely and he has been through some very traumatic times, has lost his entire business, it has been taken away, everything repossessed.

I thought I would add that my name is John DeVolk. I'm a Branch Credit Manager.

Raybro Electric Supply is 60 years old, doing business primarily in the State of Florida and South Georgia.

I've come here today for two reasons: One to implore this subcommittee to find a way my firm can be paid for thousands and thousands of dollars for electrical equipment it furnished and was incorporated into the Landplane Hangar Project at NAS Jacksonville, FL.

To help cast some light on the inequities in the administration of the Miller Act by the DAR. The Federal Miller Act requires that the prime contractor for the construction, alteration or repair, of Federal buildings furnish a payment and performance bond to the U.S. Government. The payment bond is required as security for protection of those supplying labor and materials that go into the construction of those public buildings. Failure of the contractor to pay his bills gives a supplier the right to sue the contractors bond in the name of the United States.

The Miller Act, as implemented by the DAR 10–103.2 does require payment bonds in connection with certain contracts and that such bonds be supported by "good and sufficient" surety, that is corporate individual where individual sureties are used, there must be a minimum of two, each with a net worth—exclusive of ownership or other financial interests in the bonded company at least equal to the full penal amount of the bond.

As additional protection, for each surety a certificate of sufficiency is required to be executed by an acceptable officer of a bank, trust company or United States certifying that the surety is responsible and qualified to act as such. Implementing instructions to the contracting officer and the contracting officer require close scrutiny of this information to ascertain its bearing on the true financial position of the surety. The contracting officer must be satisfied that in his judgment the sureties offered are sufficient to provide the intended protection before accepting the bond.

In this regard, I submit the following facts on Mr. D.J. Barclay, Mr. Ralph Jackson, Ms. Delores Jackson, Mr. Mike Howell, and Mr. Jim Baldock as they relate to the personal sureties by the above on various Government projects. Raybro Electric Supply Co. furnished electric equipment and/or fixtures to the D.J. Barclay and Co. on Government project C. 2441 Landplane Hanger Project in Jacksonville, Florida. After D.J. Barclay and Ralph Jackson defaulted on their personal surety bonds, Raybro obtained a judgment in the U.S. District Court, Middle District of Florida in the amount of $149,300.96 plus interest from April 2, 1985 at a rate of 12 percent per annum until paid in full. Plus costs incurred to date, Raybro Electric Supplies has not been paid.

Most of the property listed on Mr. Barclay's September 28th Affidavit of Individual Surety Form have been sold with proceeds going to the first mortgage holder. The values of real estate, listed on D.J. Barclay and Ralph Jackson's SF–28 Form was grossly overstated.

Most of the real estate listed thereon, Mr. Barclay and Mr. Jackson, were held jointly by husband and wife in direct violation of section 7A of SF–28 Form. The remaining few parcels of property not held jointly by husband and his wife were fraudulently and preferentially transferred, part interest to his wife Mary to the detriment of his creditor, Raybro Electric Supplies, Inc.

And I would like to just briefly, before I get into some of the facts that supports this, go to page nine that I wrote and just go over those conclusions. First in order to induce the United States of America to extend various Government contracts over a period of 18 months to D.J. Barclay Company, Jamar Construction Co. and joint ventures with Howell Construction Company, Mr. Barclay tendered several affidavits of individual sureties in which he represented that he was sole owner of the real estate listed thereon, when, in fact, much of the property was jointly held by husband and wife in direct violation of Section 7A.

Mr. Barclay also omits other bonds. That's line 10 Form SF-38 when, in fact, he was individual surety on several other bonds. Mr. Barclay then sells and/or transfers interest in certain farms to his wife and to Mr. and Mrs. Jim Baldock to the detriment of the United States of America and his creditors. In order to induce the United States of America to extend various Government contracts to D.J. Barclay and Company several affidavits of individual surety were issued by Mr. Ralph Jackson, Mr. Jim Baldock in which they represented themselves as sole owners of real estate listed thereon, when, in fact, all of the property that they listed was jointly held by husband and wife in direct violation of Section 7a of form SF-28.

Mr. Jackson and Mr. Baldock omitted other bonds when in fact they were individual sureties on several other bonds. Mr. Jackson was accepted as individual surety on projects, twice the stated value of his solely owned property to the detriment of the United States of America and his creditors, Ms. Delores Jackson also submitted an affidavit of individual surety for many of the same projects omitting line 10 other bonds when in fact, she was surety on several other bonds. In order to induce the United States of America to extend to Howell Construction Company and as a joint venture with the D.J. Barclay Co. Mr. Howell issued an affidavit omitting line 10 other bonds when, in fact, he was surety of several other bonds.

I submit the affidavits mentioned above were materially false for the above reasons and should have been rejected. Contracting officers were remiss in their duties to render close scrutiny to the SF-28's and other financial information to ascertain it's bearing on the financial position of the individual sureties.

Since Raybro Electric Supplies was unable to effect collection against the insufficient indiviudal sureties that were accepted by the contracting officer on behalf of the U.S. Government and through no fault of Raybro it is requested we be reimbursed for our judgment of record, including interest costs and attorneys' fees.

And in here, under facts, I have bought out some of the inequities and have made copies of the individual SF-28 forms to point out the point I was coming to. Mr. D.J. Barclay obtained and submitted three affidavits of individual sureties; all three of them were subscribed and sworn to before an officer of the court, a notary public, Elizabeth A. Cary, all on the same day, September 2, 1982, with each affidavit being submitted for a different project and each affidavit reflects "none" on line 10 of the SF-28. No other bonds, an obvious misstatement.

Mr. Barclay signed two additional FR-28s dated October 4, 1982 and a couple days later SF-28s and on June 29, 1983 and again indicated none on line 10, no other bonds in which he was on, also a misstatement.

Mr. Barclay stated on line 7A of his many sworn affidavits that he is sole owner of the real estate submitted for bonding purposes, when in fact he was not a sole owner, but a joint owner with his wife, and his wife did not sign the affidavit, pledging her share of the property as surety.

This is, in direct violation of section 7A, "Do not include property exempt from execution and sale for any reason." Surety's interest may be included if not so exempt.

This factor alone rendered the property valueless as far as collecting a judgment against one spouse only. Property owned by husband and wife is usually held as tenants by the entirety, it is practically impossible to levy against a tenancy by the entirety when judgment is against one spouse only.

I submit Mr. Barclay's SF-28 form should have been rejected for this reason alone. In addition, I submit the assessed valuation for taxation purpose, Section 8 of FR-28 form is certainly not the same as line 7A, fair value of solely owned real estate.

Again, the affidavit should have been rejected for those obvious errors. On September 30, 1982, Mr. Barclay was awarded a $2,235,071 contract for the Landplane Hangar Project in Jacksonville, Florida, Project C-2441.

Mr. Barclay executed a payment bond for $894,028 on this project, with a stated net worth $1,184,670. Mr. Barclay's FR-28 form wasn't signed until October 4, 1982. That is after the project was awarded.

It's my understanding that the SF-28 form had to be examined and carefully gone over by the contracting officer before and prior to awarding of the contract. How can this be? Mr. Barclay executed SF-28 and on September 2, 1982 for B-2447 and on September 2, 1982 for D-0023.

Senator CHILES. Who approved these?

The certificate indicated before the contracting officer who signed the certificate.

Mr. DEVOLK. You mean Mr. Barclay certified he signed?

Senator CHILES. Sombody else had to. It did not have to be approved by somebody before the contracting officer?

Mr. DEVOLK. Sir, I presume that would be the contracting officer on the Landplane Hangar Project.

Senator CHILES. There was no banker, someone else?

Mr. DEVOLK. There was a certificate of sufficiency that was executed by a Mr. Glasscock, I believe his name to be, from Kentucky, who allegedly knew this gentleman.

Senator CHILES. Who was Glasscock?

Mr. DEVOLK. The vice president or president of the bank. There is no way of knowing whether anyone of these fellows, if they had done any checking found the tenancy by the entirety.

The supporting document, and deed of trust, the warranty deed submitted to the contracting officer to substantiate the property plainly did not state husband and wife and just read alone. You can see, it should have been rejected.

Senator CHILES. Have any charges been brought against Barclay for these false statements?

Mr. DEVOLK. It's my understanding from personal data on here I've obtained from Government files that the Government or some other investigative unit is well aware of the fact that practice was going on, admitted to the culpability of this happening and they funded as though no criminal action was brought against him. He should be disbarred from further contracts.

Senator CHILES. So no criminal action has been brought against him. He has been disbarred.

Mr. DEVOLK. They said he has. I don't know if he has or not, sir.

Senator CHILES. We'll take the rest of your statements in full.

For the record, some of the details you're going into now, we'll try to hear from witnesses and have time. I think you've given me the list.

Mr. DEVOLK. There was just one other note I wanted to make Senator.

Contracting officers not only have the Miller Act, which is 100 percent performance bond, 50 percent payment bond in their favor, if it's corporate it's good and sufficient.

I feel that if it's to be personal, the personnel individual sureties should have the same strengths as a corporate surety.

Such safeguards are necessary to insure should be included, that includes the 1 year warranty period after the project is over that the bonds must remain in force and effect. The contracting officer not only has 100 percent performance bond to rely on, he can go without project payment until such time that he feels that the level of progress can be achieved before paying any funds. Under the direct contract, he has several avenues to protect the government the supplier and subcontractor does not have.

I thought I would make that plain.

Senator CHILES. As a subcontractor or supplier are you aware, can you find out before you bid or before you deal with the contractor whether he has a corporate surety, or has posted as individual surety?

Mr. DEVOLK. The law says that you must submit an affidavit, sworn affidavit to the Federal Government that you've furnished your equipment that has not been paid in order to obtain a copy of the original contract on bonds you're already behind the eight ball, you have enjoined in the contract and furnished your material.

Senator CHILES. You did not get that information before you determined what you were going to do?

Mr. DEVOLK. Not if it were available, Senator Chiles.

By the time that you probably get it under the Freedom of Information Act, you would be left by the wayside.

The time element would preclude submitting a business bid to try to get the project.

Senator CHILES. Mr. Calvert.

Mr. CALVERT. My name is Carl A. Calvert.

I am an attorney with the law firm of Matthews, Crider, Calvert & Bingham, P.C. in Albuquerque, New Mexico.

From my end, the story is a little bit better than what we've heard so far. There was an Army Corp of Engineers project in New Mexico between Albuquerque and Santa Fe for the construction of

a recreational facility, which was awarded to a general contractor from North Dakota.

And two of his personal friends from North Dakota served as personal sureties.

And they are, indeed, wealthy individuals.

And it turned out in the end that they did have some tangible wealth. They both indicated wealth in excess of $4 to $5 million, very low liquidity. One of the people was a lifetime farmer, has 10 percent of his wealth in ready assets, the rest is in wheatland and mineral rights, which did not sell easily.

The project had a number of problems. Basically, there were seven suppliers left unpaid, fairly small amounts luckily, the smaller $815, the larger $25,000 claims were made under the Miller Act.

There was no response, whatsoever, by the surety. I can contrast them a little bit with the type of dealings I constantly see where we have corporate sureties in the business of providing surety bonds, you will get some contact and maybe some actually may shift it over to the general contractor.

On the whole, you have some degree of investigation of claims. There was none. All seven filed in Federal court for the District of New Mexico, service of process on the personal sureties was made by the United States Marshall in North Dakota instead of through the normal way in which we do service on corporate sureties.

The process went through. During discovery, the president of Rayco eventually admitted that what he was doing was deliberately stalling and forcing the claimants to litigate in order to induce them to press the Corps of Engineers to pay Rayco on certain claims that the company had for additional payments. He was evidently trying to give a little extra pressure on the government.

Those statements later came back to haunt him. Within a year trial was set and the morning of trial the counsel representing two personal sureties and the general contractor stipulated the judgment on all but one of the claims. That one went to trial for a couple of hours and judgment was rendered at that time. After a year, there were seven judgments against personal sureties.

They took it on appeal to the Tenth Circuit. The Tenth Circuit with it's delays, they're not major delays, but the Tenth Circuit delayed nevertheless. Evidently those know appealing, they awarded double costs and awarded attorney's fees as sort of punitive in their discretion.

The one case that went to trial was taken up on appeal. After a year it was dismissed as a frivolous appeal.

Also at that stage we had fully appealed judgments we had been trying all along they cannot post an appropriate bond. We had to have the judgment moved from New Mexico, registered into North Dakota, we had pursued it in North Dakota with the United States Marshal and the United States Marshall ultimately elected to do so, the couple of days he actually levied on the wheatland and threatened to sell it.

And at that stage, we obtained checks, which were good checks and people were paid. The longest one took 4 years. The very small claim I would draw in comparison with dealing with corporate sureties a couple of conclusions.

I think if there were corporate sureties in the business, Rayco could not have been in New Mexico to do this project. For that probable reason where he had personal sureties was he did not have the liquidity, himself to do it to obtain other sureties. We had problems with the sureties we would not have had. We had no investigation of claims that we normally would have.

And basically, the two personal sureties with the lifetime farmer had no experience in construction, no experience in the surety business. There was no way of assessing the claims and this was simply my way of resolving it rather than fighting it all the way through the system.

Luckily in this case with the exception of some attorney's fees, all four of my clients came out with their principal paid.

Senator CHILES. Three years later and a lot of attorneys' fees.

Mr. CALVERT. Correct.

Senator CHILES. Well, the system as you all have explained it; in other words, the general contractor or the contracting officer or the people that signed the certificate earlier of sufficiency, none of that provided any real protection for you in this regard.

And I think in both of the situations for you, Larry Hughes and John, you both in your situations there was double pledging of assets that was supposed to be pledged for more than one job.

What do you see as a legislative remedy, and of you, for being involved in situations with personal sureties?

Mr. DEVOLK. I personally think, Senator Chiles, that something should be done.

And I'm sure that legal minds can device such methods that if individual sureties are to be used, I don't think anything wrong with it if such safeguards are being built in that would make sure that property is either encumbered by a lien, a recording against a property, something that would verify the fact that the property is worth the value that they said it is, certainly that an up-to-date mortgage, existing mortgage is brought out and as close to the time of assembling the bid and not 10 or 9 months prior. The property, in the meantime, can be sold.

Mr. CALVERT. I would like to see personal sureties allowed to go through the same process that corporate sureties can.

We had a circular put out in the end of July that listed the approved sureties, the amount of contracts that they are allowed to bond. Then you have something to check them against instead of pushing that duty on to a contracting officer to review.

The statements are too dominating and people want to operate in a personal mode as opposed to the corporate mode, then have to go through the same process that they are in their business. Sureties are not in the business of giving surety bonds out of the process.

Mr. HUGHES. Likely, personal sureties should be disqualified as an alternative for individuals who do not have the funds, can not obtain a corporate bond for whatever reason, that perhaps the Federal Government take more active role in the fight providing joint check agreement in submitting reasonable payment jointly to the general contractors and subs.

The general contractor should still be required directly—for a lot of individuals cannot go out and get a corporate bond—to get the

bond out the bond company should take an active role disbursing the funds.

Senator CHILES. At what point did you know that the general contractor was using a personal surety rather than a corporate surety in each of the cases that you have given?

Mr. Calvert, do you know when your client knew that?

Mr. CALVERT. In my case, I found out by contacting the contracting officer who gave me copies of the standard Form 28 in order to get names.

Senator CHILES. This is after the fact?

Mr. CALVERT. Completely after the fact.

In response to an earlier question of yours, I don't think in the bid process if a contracting officer volunteered them quickly, put them in the mail possibly, but just goes to show you as Ms. Mobley where you all go to do business or you're able to find that out in a timely fashion.

Mr. HUGHES. We received a letter from the surety company one of the individuals in the joint venture told us the bond was in process, that's very common, we called to verify it and the bonding agency tells us it's in process and that, you know, you call back within 2 weeks and they give you the bond number. It has not been assigned at that time.

The corporate practice for my company is not to followup. We discovered at the time we were having problems collecting, we are going to file a claim against the corporate bond——

Senator CHILES. It would seem if a personal surety were going to be allowed to be used that certainly a sub or supplier ought to be able to know up front that there is a personal surety.

In other words, you enter at your own risk or there should be some red flag there indicating that you are going to be protected.

There is no red flag there right now. You don't really see one do you?

Mr. HUGHES. I think there is advantage to having personal sureties if you get by a very small payment that we have bids going out, a very marginal difference, 1 percent or 2 percent bond premium is going to make the difference in getting the contract maybe.

Senator CHILES. Do you know of any other small contractors that have similar problems like you have?

Ms. MOBLEY. There were at Patrick Air Force Base where several got judgments and we tried to prove to the Government that we are not going to be paid and that we proved everything we could and that never did help.

Several people ask me still how is my case going and everything. My advise was it's not worth suing for. You lose more than it takes.

Senator CHILES. Well, what advise would you all have for other subcontractors if the regulations are not changed?

Ms. MOBLEY. Not to supply material to a job with a personal surety.

Mr. DEVOLK. Or to stay away from it if an individual surety as in the particular Landplane Hangar Project.

I believe, if my memory is correct, that the first Bankruptcy Petition that Mr. Barclay filed, I think it was very close to $1 million of upaid suppliers and subcontractors, of which he was paid close to

$1 million for Raybro Electric supplying the largest and I was paid and walked away.

Mr. DEVOLK. I would like to see some consideration being given to an allowance of attorney's fees, which isn't part of the statute.

It has to be by separate contractor by some State laws.

Mr. CALVERT. Maybe a funding pool for unpaid claims to be pooled from.

Senator CHILES. We thank you very much for your testimony here.

And we're going to see if we can get some changes made. And your testimony has been helpful very much in that regard.

Okay. We'll now hear from our second panel. And we are going to have Mr. Gene Lee, the vice chairman of the Governmental Relations Committee of the American Subcontractors Association and Mr. McCollough, the Executive Vice-President of Mid-Florida Associated General Contractors, Mr. McCormick, the President of Northeastern Associates. I would ask them to come up now.

TESTIMONY OF GENE LEE, VICE CHAIRMAN, GOVERNMENTAL RELATIONS COMMITTEE, AMERICAN SUBCONTRACTORS ASSOCIATION;[1] JEFF ROGO, REPRESENTING BOTH CLAY McCOL LOUGH, EXECUTIVE VICE PRESIDENT, MID-FLORIDA ASSOCIATED GENERAL CONTRACTORS AND GENE McCORMICK, PRESIDENT, NORTHEASTERN ASSOCIATES

Mr. LEE. I am Gene Lee. I am representing the American Subcontractors Association.

Many ASA members perform construction for the Federal Government. Sometimes they serve as prime contractors, contracting directly with the Federal Government. More often, they serve as subcontractors, dealing with the Government only through a prime contractor.

In both situations, these specialty trade contractors have a direct and real interest in the Federal Government's construction program, particularly their ability to get paid for work performed.

Congress recognized this issue when it passed the Miller Act in 1935. The Miller Act provides for a performance bond to protect the Government and a payment bond to protect all individuals and companies supplying labor and material on Federal construction projects.

Because of the Miller Act, most subcontractors believe they can bid and perform a Federal contract with full assurance they will ultimately be paid. When payment becomes slow or stops altogether, prime contractors often tell their subcontractors and suppliers, "Don't worry. After all, I'm bonded." and the subcontractor continues to work.

If the sub gets real worried about slow pay, he may contact the Government's contracting officer for help. Again, he often is told, "Don't worry. We'll make sure you get paid. After all, the prime contractor is bonded."

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[1] See p. 43 for Mr. Lee's prepared statement.

But, time and again, subcontractors perform according to the specifications on Federal construction and never receive final payment.

There are a multitude of reasons why, for many subcontractors, the protections of the Miller Act have become a snare and a delusion. These are detailed in our written statement.

But one reason is the issue we're here to discuss today—the use of individual sureties.

Mr. Chairman, this morning you've already heard about the "house of horrors" a subcontractor enters when he first discovers that the prime contractor has defaulted and the bond is a personal surety. I'd like to discuss how and why these situations occur, their frequency, and propose some possible solutions.

First, just what is a personal surety and how do they operate on Federal construction?

A personal surety simply is an individual or group that pledges to make good on the contract if the prime contractor fails to perform or fails to pay subcontractors and suppliers.

Under Federal regulations, at least two individuals must execute the bond and complete the Standard Form 28 to qualify as an approved bond. The net worth of each must equal or exceed the amount of the required bond. Any U.S. citizen may serve as a personal surety as long as he meets these criteria.

Indeed, even a principal of the firm being bonded may serve as surety as long as the assets he pledges don't include shares in or assets owned by the contracting firm.

The Government's contracting officer is charged with determining that the assets pledged exist and have been appropriately valued. These assets can be real estate or other assets difficult to appraise and even more difficult to liquidate in the event of the prime contractor's default.

The Standard Form 28 contains a self-certification which must be notarized. And it requires a "certificate of sufficiency" signed by an appropriate financial or legal counsel. That is all.

There is no mechanism to assure that the property is subject to a claim against the individual serving as the personal surety. And there is no mechanism to prohibit the personal surety from pledging the same assets against a number of different contracts.

Contracting officers have neither the time nor the expertise to stop the fraudulent practices that proliferate under the personal surety approach.

How widespread is the problem? It is hard to judge whether the problem is bigger than a breadbox or smaller than an elephant. But we know there is a problem and the problem seems to be growing.

As you can imagine, ASA receives hundreds of phone calls a month from subcontractors with problems of one sort or another. It used to be that we would hear about a problem with a personal surety once or twice a year. For the last 12 to 18 months, we've been receiving an average of two to three phone calls a month. That is a dramatic increase.

In our view, the growth of this problem has been caused by two things.

First, during a period of widespread growth in the construction market, the corporate surety market has experienced severe losses. The result has been tighter underwriting by corporate sureties.

Second, a new industry has sprung up—an industry comprised of individuals who are serving as facilitators or brokers for individual sureties and contractors. These brokers provide an organized marketing and processing service for personal sureties to provide bond for contractors. Such companies often seem designed to take advantage of the smaller, unsophisticated contractor or anyone that is not knowledgeable about bonding.

Mr. Chairman, you've heard today about a system that is failing to achieve the goals for which it was established. What can be done about it? There are several alternative solutions:

First, personal sureties could be held to the same standards that corporate sureties are under the Treasury regulations. These include incorporation, $250,000 in paid-up capital, and the ability to carry out its contracts.

Essentially, this would require the Treasury Department to conduct the same kind of investigation and monitoring for each personal surety as it does for corporates sureties. ASA believes, this procedure, for practical purposes, will eliminate the use of personal sureties.

Second, the Federal Acquisition Regulation could be amended to eliminate the option of personal sureties for performance and payment bonds on Federal construction.

Or, third, the Miller Act could be amended to prohibit the use of personal sureties.

The American Subcontractors Association is opposed to the use of any alternate security in lieu of corporate sureties on public works. Therefore, our preferred solution is the third—an amendment to the Miller Act itself.

But our immediate objective, Mr. Chairman, is to put an end to the potential for fraud and abuse that exists in the current program. We are willing to work with you and the appropriate officials of the Executive, to develop a workable solution to this problem.

Thank you, Mr. Chairman. I will, of course, be happy to answer any questions you may have.

I thank you.

Senator CHILES. I thank you, Mr. Lee, for your testimony.

Mr. ROGO. My name is Jeff Rogo of Associated General Contractors of Mid-Florida.

Mr. McCollough and Mr. McCormick are tied up in another meeting. I've been asked to submit this statement.

The Associated General Contractors of Mid-Florida represents more than 350 firms in the central part of Florida, including the construction market areas of Tampa Bay, Orlando, Daytona and Cape Kennedy. AGC of Mid-Florida is an affiliated chapter of The Associated General Contractors of America.

Over the years AGC of America has stated its concern over the provisions of the Federal Acquisition Regulation (FAR), Subsection 28.202-2 which provides for the use of individual sureties as acceptable bonding on Federal construction contracts.

The AGC of Mid-Florida would like to support and endorse the statement presented to this committee by AGC of America. In summary the statement makes the following points:

AGC members have seen a proliferation in the use of forms of surety other than corporate surety and AGC has adopted a policy in opposition to the use of these forms or surety.

AGC suggests that the Federal Acquisition Regulation (FAR) be amended so that the criteria applied to corporate sureties is applied to individual sureties to reduce the abuses resulting from the use of individual sureties.

AGC believes that individual sureties, in addition to not providing the government with adequate protection, provide a bidder with an unfair competitive advantage.

In summary, AGC believes that corporate surety bonds should be the sole form of surety allowed for use in the public sector. Short of achieving this objective, AGC recommends that FAR be amended to eliminate the potential for abuse resulting from the use of individual sureties.

Senator CHILES. It seems like the purpose that someone was seeking a long time ago was a pretty good purpose.

Some people out there maybe, you know, have difficulty getting a corporate bond, paying a premium or being able to move or getting people well secured, that they will or you said eliminate all have to be corporate bonds.

What about letters of credit? What about some kind of deposit of assets, you know positive cash, there are other things just as good as a corporate surety bond and maybe better.

Obviously we have a breakdown here we know is not working. We know people are getting hurt and no provision it was seeking to provide. All of us are trying to encourage competition for the Federal Government. What we are seeking is getting more parties bidding. That was probably the purpose originally in what you were doing.

You were going to allow a bigger pool so it does not have to be just someone with a long history to get into the business to start with.

So you know that is, I think, is what we are over all seeking is maybe ending up having to do just corporate sureties.

It looks like to me no way that the system can work if a contracting officer or whoever is certifying that surety is not trying doing their job, not trying to do anything, obviously cannot.

And there does not seem to be—the Government has no responsibility, whatsoever. They are not going to lose. There is no reason they have to check. Evidently the contracting officer, there is nothing happens to him to limit the contracting officer until they're functioning where he was before.

So now there is no system of checks. So obviously it cannot fly on that way either.

What would you think about some of our alternative ways of trying to effect the situation.

Mr. LEE. My thoughts on that, of course the simplest way to handle it is just to eliminate all personal sureties.

I can understand the need for some consideration of people that have a problem with obtaining a corporate bond. I could under-

stand that the corporate surety market has been reduced in size a lot and it's much harder to obtain than it was three or four years ago.

What we are really looking for as subcontractors is some guarantee that if and when we perform we get paid for it and that's really our concern.

The problem with the personal sureties now is they're just not there when you need them.

Senator CHILES. Well, let me ask you this.

How effective is the surety program in your experience?

Mr. LEE. The SBA surety program is an effective program. It does a better job of providing or assisting subcontractors in obtaining a bond than it does a general contractor probably just because of his size, reputation. It's definitely a viable program.

Senator CHILES. You don't have any experience with that?

Mr. ROGO. No.

Senator CHILES. Well, I appreciate again your testimony given for Mr. McCollough and Mr. McCormick.

And I am delighted to see that subcontractors and general contractors agree to something.

Mr. LEE. We are too.

Senator CHILES. My experience lately, that does not seem to happen as frequently as I hoped it will. In the future I'll be glad to see that. Thank you.

Now we are going to hear from Mr. Angell, the president of William Angell Company of Florida and Joseph Perry of American Insurance Association.

I understand you all would like to speak to us now. Thank you. All right. Mr. Angell, start with you first.

TESTIMONY OF WILLIAM J. ANGELL, W.J. ANGELL COMPANIES, INC., CLEARWATER, FL; AND JOSEPH PERRY, AMERICAN INSURANCE ASSOCIATION

Mr. ANGELL. Senator Chiles, thank you for this opportunity.

Mr. Chairman, my name is William J. Angell and I am President of the W.J. Angell Companies, Inc. of Clearwater, Florida, a member firm of the National Association of Surety Bond Producers, which I'll refer to today as NASBP.

I have been an agent specializing in surety bonding and insurance for construction contractors for twenty-one years and have served the NASBP in various capacities including director, regional vice-president, committee chairman and seminar instructor.

We appreciate the opportunity of testifying before the subcommittee on the subject of personal or individual suretyship.

NASBP is an organization of more than 600 professional insurance agencies and brokerage firms located throughout the United States, Canada, Puerto Rico, and Great Britain that specialize in providing contract surety bonds and insurance to construction contractors.

Our organization closely monitors events that relate to the construction and surety industries. Recently we have become alarmed about the use of personal or individual sureties on public construction projects and we are grateful for the opportunity to make

known to the subcommittee the very real risks that are assumed when a federal agency accepts an individual surety.

We strongly believe that the use of individual or personal sureties is not in the best interests of public or private owners, contractors, subcontractors, suppliers, laborers, or taxpayers.

Personal or individual suretyship is nothing more than having one individual or a group of individuals serve as "surety" to answer for the debt, default or miscarriage of the principal obligor.

Personal suretyship went out of fashion in the latter part of the 19th century when corporate suretyship developed. The primary reason corporate suretyship came into existence was the indisputable fact that all personal sureties will die—some sooner than others. However, Federal statutes and some state and local jurisdictions still permit the use of personal sureties.

Under the Federal Acquisition Regulations (FAR) promulgated on September 19, 1983, Federal contracting officers are given the authority to accept individual sureties in lieu of corporate surety bonds.

The FAR regulations place on the Federal agency—specifically the contracting officer—the onerous burden of determining the acceptability of the individuals proposing to act as sureties.

If a contracting officer accepts a personal surety, the officer has assumed the burden of determining that the individual is financially able and willing to perform if the principal defaults.

Corporate sureties, on the other hand, are regulated and approved for writing bonds on Federal projects by the U.S. Treasury Department which has a sophisticated system of analyzing sureties' financial statements and claims-handling records. Government contracting officers can satisfy themselves that a corporate surety is Treasury-approved and has been issued a certificate of authority by the Department simply by ascertaining that the company is listed on the roster of acceptable sureties published in the Federal Register each July, which I have a copy here of the current one. This listing also shows the largest bond amount that the company may write without reinsurance under their certificate of authority.

Moreover, since suretyship is considered to be a line of insurance by all of the states, corporations writing surety bonds—even if only bonds with the Federal Government as obligee—must be licensed by one of the state insurance departments.

In order to become licensed, the principals of the corporation must undergo an extensive background check. The corporation must meet minimum capital requirements and make deposits with the state for the protection of clients.

Corporate sureties must file periodic financial statements with all the states in which they do business. Every 3 years they are examined by a team of trained insurance examiners to make certain they are not writing too much business and that they are maintaining the necessary reserves.

None of this protection is available when personal sureties are used.

In the case of individual or personal sureties, the task of prequalifying the individual surety falls on the Government contracting officer. But if the contracting officer's judgment is wrong and the surety fails to perform, the public body is forced to absorb the loss.

The FAR regulations require that at least two individual sureties must execute the bond and the net worth of each must equal or exceed the penal amount of the bond.

However, when an individual surety is approved based solely on strength of the assets as shown on the financial statements—which do not even have to be certified and audited under the FAR rules—the public owner runs the very real risk that if a loss occurs, the assets relied upon may have disappeared, or may have never existed in the first place.

There is also the obvious risk, which I have mentioned before, that an individual acting as surety could die before the contract is completed and all outstanding bills paid. This is obviously not a concern with a corporate surety.

While the death of personal sureties does not necessarily render their bonds completely worthless in all cases, it does in most.

Only if the contracting officer becomes aware of the death of the personal surety—an unlikely event—do they have the remotest chance of protecting the Government's interest. Even then, they might only have a contingent claim against the decedent's personal estate, if it is solvent, that is.

Thus, with a personal surety the Government is needlessly assuming a real risk of financial loss that would be absent if the project were protected with a corporate surety bond. And as we have already discussed, in addition to complying with the rigid standards imposed by the U.S. Treasury Department, corporate sureties are licensed and regulated by each of the states in which they operate.

The Federal Government requires contract bonds on public work for reasons over and above the financial protection afforded by the bond. According to the 1975 General Accounting Office report on the role of surety bonding, the prequalification of contractors was cited as a function that corporate sureties are in a much better position to perform than are Government contracting officers.

A contractor's corporate surety evaluates the contractor's total financial situation, work program, area of expertise, bill-paying record and past performance before it will agree to provide a bond on any given project. There is no assurance that an individual surety will perform this kind of thorough investigation; it is very unlikely that an individual could do so in any event. What individual, acting as surety for a contractor, has the trained staff to complete the extensive credit analysis, financial statement review, and analysis of current workload required to successfully prequalify that contractor?

A corporate surety, through its bond, is warranting to the contracting officer and the public body not only that it will pay under the bond if the contractor defaults, but more importantly, that it has rendered its professional opinion that the contractor has the financial resources, the experience, the personnel, and the overall ability to successfully complete the project.

The FAR regulations warn Federal contracting officers who are considering accepting individual surety bonds to "consider the number and amounts of other bonds upon which a proposed individual surety is bound, and the status of the contracts on which such bonds were furnished." Good advice, because each one of those

"other" bonds is a real liability for the individual which should be properly deducted from his assets in determining if the individual's net worth is adequate.

Again, the burden is solely on the contracting officer to determine the existence and size of other outstanding bonds on which the individual in question is acting as surety. Of course, the contracting officer has no way of preventing the individual surety from taking on additional obligations, once the personal surety has been approved for the case at hand.

Personal sureties, being totally unregulated, are free to charge whatever they want for their "service." They may charge a stiff premium or demand a percentage of profits or both. Considering the very thin profit margins available in today's construction marketplace, the fee exacted by the personal surety may even impair the contractor's ability to earn a profit on the project.

Usually, the contractor who seeks the service of a personal surety has been turned down by one or more corporate sureties that have concluded that the contractor is not qualified. This not only increases the potential for failure, but is unfair to qualified contractors who stand to lose work to an unqualified competitor.

Subcontractors, suppliers and laborers on public projects depend on the surety bond for payment in the event the general contractor defaults. Ordinarily, these members of the construction team are prevented by law from placing a lien against public property.

Hence, they must rely entirely on the surety as a source of recovery if they are not paid. It is very unlikely that an individual acting as surety would have the capability of efficiently handling the numerous claims of subcontractors and material suppliers covered by the payment bond.

It is NASBP's belief that accepting surety bonds from individuals, regulated neither by state insurance departments nor the Federal Government, needlessly exposes the Government to considerable liability.

In the case of a corporate surety, a Government contracting officer can assure himself of a surety company's viability simply by ascertaining that the surety has been issued a certificate of authority by the Treasury Department and is, therefore, included on the Department's annual listing of surety companies acceptable on Federal bonds, and that the amount of the contract in question does not exceed the permissible single contract dollar limitation shown on this Treasury list.

NASBP submits that if individual sureties are to be accepted on Federal contracts, then they too should be subject to the same degree of scrutiny and regulation as are the corporate sureties that are included on the U.S. Treasury Department's list of surety companies acceptable on federal bonds published each year.

Mr. Chairman, the National Association of Surety Bond Producers appreciates this opportunity to present this testimony on this important issue. I would be happy to try to answer any questions that you might have.

Senator CHILES. Thank you, sir.

Mr. Perry.

Mr. PERRY. Senator Chiles, I am Joseph G. Perry, Counsel of the American Insurance Association located in Washington, D.C.[1]

The American Insurance Association (AIA) is an insurance trade association of 171 property-casualty insurers doing business in all 50 States. Included within the membership are 9 of the top 15 underwriters of contract surety bonds in 1986.

Surety bonds guarantee the performance of a legal obligation. There are two contract surety bonds; performance bonds and payment bonds. Performance bonds guarantee that a project will be constructed in accordance with the contract plans and specifications and payment bonds guarantee that all bills for labor and material will be paid.

When a claim is made, the surety is required to investigate the alleged failure of performance, the bond principal's legal position with respect to the alleged default and, if the surety agrees there is a default, how best to remedy the default.

A performance bond claim arises when the owner declares the bond principal in default and the principal fails to cure the alleged default within the time period provided for by the contract. The surety must then review the facts alleged to give rise to the default, the principal's legal position with respect to the alleged default and other related items, such as the contract terms. A legal analysis of the claim must then be conducted. This includes a review of Miller Act provisions, contract law and other related legal issues, including the law of suretyship.

A payment bond claim arises with an allegation of wrongful non-payment. The party that has not been paid may either be a supplier of materials, a subcontractor or a laborer. The surety must investigate the basis for the allegation of wrongful non-payment, the bond principal's legal position with respect to the claim, and other related items, such as the contract terms. A legal analysis of the claim must then be conducted. This includes a review of Miller Act provisions, contract law and other related legal issues, including the law of suretyship.

As in the case with performance bonds, if the surety determines that a valid claim exists, there must then be a determination of how best to remedy the default. It is important to note that the surety must take into account the principal's legal position with respect to any claim. If the surety fails to do so, it jeopardizes its right to be reimbursed by the bond principal for all losses incurred. This is a fundamental right of sureties because, without it, the surety bond would not provide the necessary financial incentive to the principal's performance.

Often a surety will not take a position on a claim that is contrary to the principal's position because of good faith dispute exists between the bond claimant and the principal. Such a response is appropriate and upheld by the courts.

However, this does not relieve the surety of its obligation to make a full, fair and independent investigation of every claim. Nor does this relieve a surety from its obligation to make an independent assessment of the validity of the claim.

[1] See p. 58 for a letter Mr. Perry sent to the Subcommittee, Sept. 15, 1987.

Balancing the principal's right to have its legal position heard against the claimant's right to have a default remedied is the most difficult aspect of surety claims. As a result, there is no amount of time which can be prescribed for the proper resolution of all surety bond claims. Also, there is no one method to review all claims. Each claim is different and must be reviewed on its own merits.

Sureties like surety bond claims must be judged individually. Because individual sureties are not regulated as the corporate sureties are, it is very easy to find examples of poor performance by individual sureties.

AIA questions whether there is a problem because the system allows individuals to act as sureties or is there a problem due to improper or little regulation of those individuals that seek to act as sureties? AIA does not believe it is necessary to amend the Miller Act.

Senator CHILES. Does not believe it's necessary?

Mr. PERRY. No, sir.

Senator CHILES. This is an AIA question that the Miller Act can be fixed by enforcing it.

Mr. PERRY. To my best belief, in order to answer this issue, Senator, if I may suggest, there is a considerable dearth of information within the Federal Acquisition Regulations.

The contracting officers are not legal specialists, they are contracting specialists, without knowledge of the law of suretyship, which is a very specialized area. And I don't believe the regulations adequately address what a contracting officer may do in a claim situation.

Senator CHILES. So do you believe that the problem could be resolved by adding something to the Federal Acquisition Regulations assisting contracting officers in dealing with the claims situation and regulating individual sureties in a meaningful way similar to the way corporate sureties are regulated?

So you're saying if you're going to allow individual sureties, they have to be regulated almost the same way that the corporate sureties are.

Mr. PERRY. I believe the regulation has to be meaningful.

In the farm areas of the United States banks have trouble with real estate and mortgages. There are a lot of foreclosures, forced sales value of properties is seriously depressed.

I don't believe that the people that are currently reviewing the assets that are being proposed to secure the contracts are knowledgeable enough to understand what kind of security is work taking.

Senator CHILES. Do you think that the Treasury Department has the capability to regulate individual sureties?

Mr. PERRY. I think the Treasury Department certainly would be one area to review.

Senator CHILES. Well, there is a concern I have as if we go through so much paperwork, regulation and everything to regulate an individual surety, we probably take away any benefits an individual surety had to start with and might end up back to corporate surety if you have to make the costs type delay, everything else.

So you may have to put in so many regulations if they are to do it. We all take a different position with your situation.

Mr. ANGELL. Well, there is nothing wrong with the entity or an individual or a corporation.

But we do feel that same set of standards ought to apply to personal sureties as it does corporately. That is my exact very point.

And I think if a personal surety is involved, they would also need to have some prequalification of their ability to transfer their assets and losses as obligations on openended contracts.

Senator CHILES. Again, we have heard testimony that says if you are a corporate surety entity out there, this is one of the reasons that's giving rise to more individual sureties shakedown still continuing with the corporate sureties.

I asume that is because there are some losses connected.

Mr. ANGELL. I would like to speak to that, Senator.

The reason sureties have had losses is because of a number of problems, nonetheless an extremely competitive construction economy, hostile environment and other factors.

But that is the situation of that people in the business of prequalifying contractors for doing work as taxpayer expenses are not even able to do it effectively to the point where they can make a profit, they are going then by inference, which is not a very good job and, yet, then with tremendous national staffs and systems and procedures probably what amounts to a five or six level approval process, they are trying to make the right decision certifying in the face of logic, turned around and determine that because the government is having default that we should allow another mechanism that is significantly less capable of handling the problems.

I think the surety loss problems because of taxpayer money is more at risk then ever. It's a business that gets better work and so forth. But if any surety needed to do that job better and we certainly need to do everything we can to certificate the taxpayer money as a taxpayer.

The last thing I would want my dollars handled would be by a personal surety.

Senator CHILES. Is there a competition problem here where the fact that if you have a problem suggests you were not paid any bond premium; therefore, you might be a low bid.

Mr. ANGELL. In the earlier years it should have competitive to have a personal surety where part of the same corporation was going to work. And if that was the typical case, the answer would be to increase the frequency of use of personal sureties.

However, I think it is a business that has developed and it's generally the clientel from that business, generally they are not able to qualify with corporate sureties, lack of time or experience, financial, lack of financial base interferes.

From my experience, these people have entered into a market looking for a broker and they are generally over a barrel looking for a surety, maybe they have put up a surety check on the job, it's sitting there ready to get started and cannot come up with some, again a hardship position, and pay something more, maybe one, maybe two, maybe three times as much.

Senator CHILES. So they're actually paying more to get their personal surety.

Mr. ANGELL. We have found that they have pay application fees in advance, they have to earn, in some cases, a sharp profit.

So I think the modern increase is something that's not by any stretch of the imagination. It does not, however, allow people not qualified by the standard regulations of the corporation sureties as being capable of performing.

Senator CHILES. We thank you very much.

Mr. PERRY. I wonder if I could interject a couple of comments. You asked a couple of questions to two gentlemen from AGC. And I want to discuss it, if I could. You had a question on the SBA program, how well it was working.

They indicated in their comments some reference to size of contract, questionable within that conract is the SBA program limited in the size of contracts and contracts the upper bond limit of one million dollars.

Also, you asked whether either of those gentlemen had come about the alternative form of sureties beyond the surety bonds. You specifically mentioned a cash or letter of credit.

If I may, I would like to address some comments to the concept there may be some reasonable alternatives to surety bonds.

AIA does not believe there are reasonable alternatives to surety bonds. We think that you have to in considering that statement consider the contractual parties involved, not just the public's interest in having a job completed that's best quality for the lowest price; that is competitive.

You have to consider the concept of the interest of the subcontractors and suppliers reasonably being paid. And you also have the interest of the contractors, the general contractors performing the work and their being able to have a resource available to perform the work and also available to do bids on their job.

The reason I think these have consideration to be taken into account, if you do send cash or letters of credit, you find their net worth has begun to change and they will not have it available to use in the work or to perform on the job, they have to interpose a contracting officer or, if necessary, supply a letter of credit, their line of credit at a bank will be reduced by the amount of the letters of credit.

So we have a smaller margin of credit to use with the bank in order to assist their performance of the job.

As you contemplate the concept, you think about the possibility that one contractor might leave a deposit with five different contracting officers, reducing cash on hand for working capital.

On the other side of the coin, if you have each contractor bidding on all jobs it might expected to deposit cash and a letter of credit might be a ready source of funds available for payment of claims if a claim does arise.

But the contractor would not be able to have as its position heard if a valid defense to allleged default the cash or letter of credit if someone else is able to withdraw your cash and drafts down to the letter of credit without consideration for the valid position of contract.

On the other hand, if bankruptcy occurred and a contract trustee or bankruptcy trustee takes over this may impede the timeliness of your ability to get your cash or letter of credit arguing that the assets of the estate are something which the debtor could take ad-

vantage of in performance of contract from the prospective of claim.

And in a supplier/subcontractor, you have the bankruptcy issue if the trusteee would actually have the right to make a claim arguing that the assets of the estate or if the bank that stands behind the letter of credit were to become insolvent the FDIC may not have any obligation, at all, if the letter of credit is a standby letter of credit or if there were obligations to only limit it to one hundred thousand, possibly.

Senator CHILES. We thank you all for your testimony. We appreciate your appearance.

Our last panel we'll hear from is the Honorable Robert P. Bedell, Administrator for Federal Procurement Policy and Ms. Terry Boyer of the Surety Bond Branch Office of the U.S. Treasury and Mike Ganos, an officer at MacDill Air Force Base.

[All witnesses sworn.]

Senator CHILES. Ms. Boyer we'll start with you.

TESTIMONY OF TERRY BOYER, MANAGER, SURETY BOND BRANCH, FINANCIAL MANAGEMENT SERVICE, U.S. DEPARTMENT OF THE TREASURY

Ms. BOYER. I am Terry Boyer, Manager, Surety Bond Branch of the Financial Management Service of the U.S. Department of the Treasury. I am pleased to have this opportunity to appear before the Subcommittee on such an important issue.

The Financial Management Service manages the collection, investment, and payment of nearly $2 trillion each year and is accountable for providing services to over 250 million Americans. We use a wide variety of sophisticated technology to manage Federal funds, oversee the Government's central accounting and reporting system, and provide a wide variety of financial programs which touch the lives of Americans, from Social Security recipients to taxpayers receiving income tax refunds. We provide leadership for financial management in the Federal Government.

My organization, the Surety Bond Branch, is responsible for qualifying insurance companies that wish to write surety bonds for the Federal Government. The authority under which we perform this qualification process is 31 U.S.C. 9304–9308. This portion of the United States Code specifically relates to the qualification of corporate sureties.

Before getting into detail about the procedures that we follow in its qualification process, I think it is very important to point out that the business of insurance is regulated at the State level, and that monitoring the financial solvency of every company authorized by the Financial Management Service is primarily the responsibility of State Insurance Department authorities. In general, these authorities examine the companies on a 3–5 year cycle.

A company initially applying to be certified to do business with the Federal Government must submit annual financial statements for the 2 years preceding the data of application, documents indicating that the company can legally transact the business for which it is seeking authority, audited financial statements, if available, a copy of the company's most recent State Exam Report,

biographical data on officers and directors and the company's surety manager, information on company ownership, a summary of the company's plans for writing Federal surety, and other miscellaneous information.

Our conclusion concerning authorization of a company to write Federal surety is mainly based on whether a company meets our specified minimum financial requirements. These requirements include the following: One company must meet minimum surplus requirements.

A proposed regulation which has been published for comment would set this minimum at $2,000. It is presently at $500,000. Approximately 50% of our companies have a net worth of over $50,000,000. Two, company's assets must meet stringent valuation and liquidity requirements, and three, reserves for losses must be maintained at an adequate level.

When a company is initially authorized, the Financial Management Service sets an underwriting limit on the company. This limit, which is based on the company's net worth is called an underwriting limitation, and places a per risk restriction on the size of risk that a company can insure without spreading portions of the risk to other insurance companies.

A company's original authority is either renewed or terminated on an annual basis. If renewal occurs, a new underwriting limit is established.

So that we can monitor continued adherence to its minimum financial requirements, all authorized companies must file quarterly and annual financial statements. A company must meet our minimum financial requirements at all times throughout the year and may have its authority revoked at any time throughout the year.

In addition to the already mentioned procedures, we monitor company results for 11 ratios which are used industry-wide to assist in targeting financial problems, we obtain audited financial statements annually, if available—approximately 95% of our companies are audited—we continue to receive reports of examinations that the State Insurance Department periodically conduct, we monitor changes in ownership, and we interact with State regulatory officials and law enforcement agencies, if necessary.

We also have provisions in the Code of Federal Regulations which provide procedures for Federal agencies to follow in requesting assistance for the Financial Management Service when they incur problems with a corporate surety meeting its obligations under a bond.

I have brought the following exhibits with me for submission for the record: Circular 570 which lists companies presently authorized by the Treasury Department; 31 U.S.C. 9304–9308; 31 CFR Part 223 of the Code of Federal Regulations that we operate under; the annual reporting guidelines that we transmit to Treasury authorized companies; and the list of data which must be submitted by applicant companies.[1]

This completes my prepared testimony and I would be happy to answer any questions you may have.

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[1] The exhibits referred to have been retained in the Subcommittee files.

Senator CHILES. Thank you, ma'am.

We'll get all of the testimony and I'll ask you some questions.

Next, we will hear from Mr. Mike Ganos, a procurement officer at McDill Air Force Base here in Tampa.

Mr. GANOS. Thank you, Senator Chiles. I do have a statement I want to read.

TESTIMONY OF MIKE GANOS, PROCUREMENT OFFICER, McDILL AIR FORCE BASE, TAMPA, FL

Mr. GANOS. I'm a procurement officer at McDill Air Force Base. I have had considerable experience in dealing with corporate sureties. I have only one experience in dealing with an individual surety. On that one situation, the individual involved was extremely wealthy, so I had no real problem allowing him to not go the corporate route.

In all honesty, Senator I agree that something should be done. I don't want to say that one segment is completely at fault in this situation, that is the situation where an individual surety is used. While it may be true that contracting officers are the ones who take the final and approving action. The fact is, contracting officers are simply not equipped to adequately judge whether the individual surety that is being offered is of proper value.

Senator CHILES. You said that you've only accepted one individual surety in your entire career as a contracting officer, is that right?

Mr. GANOS. That's correct, Senator.

Senator CHILES. What kind of remedies would you prescribe for the problems we've heard about today from the members of our first panel?

Mr. GANOS. Senator, I think somehow we need to try and make sure that subcontractors don't find themselves in a situation where they can't continue in this business because of something the governmental officials did.

Senator CHILES. Thank you, Mr. Ganos, I may have some questions for you later. Our final witness will be Mr. Robert Bedell from the Office of the President. Mr. Bedell heads the Office of Federal Procurement Policy. He is responsible to both the President and the Congress for procurement reforms. Certainly this is an issue which deserves the attention of the administration and we welcome his statement.

TESTIMONY OF ROBERT P. BEDELL, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY

Mr. BEDELL. Thank you, Mr. Chairman. First of all, I'd like to commend you for holding these hearings today. Your leadership in the area of procurement reform has been beneficial.

As I listened to the testimony of the first panel of witnesses this morning, I agree that something needs to be done about this problem. Contracting officers are put in a bad predicament when they rely on a certificate of sufficiency that may simply not be the value that it should.

The National Association of General Contractors wrote the Federal Acquisition Regulation asking them to look at the abuses in

the personal sureties program. I believe that the FAR council should re-open the request by the General Contractors and see if we can't reach some kind of agreement. Certainly, I think that the FAR council should re-open this whole question so that we can try and resolve it.

Senator CHILES. Thank you, Mr. Bedell.

Ms. Boyer, I noticed that you flinch each time a witness mentioned having individual sureties come through your department, would such an arrangement be a problem?

Ms. BOYER. Very definitely, yes. I don't envision my agency giving me more personnel and I really don't think I could take on such a workload under the current number of people I have.

Senator CHILES. I understand. If I understand your formal statement correctly, you do audit the companies you certify.

Ms. BOYER. That's correct Senator. I can't see how we could possibly audit every person who wanted to file a personal surety. The workload would be impossible.

Senator CHILES. If we didn't have some sort of audit capability or some form of accountability then we would be right back where we are now, is that correct?

Ms. BOYER. That's correct.

Senator CHILES. Mr. Bedell, obviously, the problem which was in effect closed by the FAR council deserved some government reaction. Could the OFPP initiate some action to get us beyond where we are?

Mr. BEDELL. Yes, Mr. Chairman, actually the OFPP may even be able to initiate a study into this issue. However, when your committee looks at OFPP's reauthorization, perhaps we'll be able to offer a concrete proposal to you.

Senator CHILES. Thank you very much. I want to thank all the witnesses for their testimony here today. Let me say that when you have a situation such as the one we've heard about today, you realize that under this program of providing personal surety protection we may be hurting subcontractors around the country. That is not our aim, that is not what our program is designed to do.

Again, we, in the Congress, will be looking for ways to make this program effective. The Subcommittee will adjourn and await the call of the chair.

[Whereupon the Subcommittee was adjourned to reconvene at the call of the Chair.]

APPENDIX

PREPARED STATEMENT OF LARRY HUGHES

Good morning, Senator Chiles, my name is Larry Hughes. On October 5, 1981 I was the President of Destin Cabinets Inc. of Destin Florida. My brother and I employed eight to ten people on a regular basis. Sometimes our employees reached as high as 18 people. We had a thriving business. October 5, 1981 should have been one of the happiest days of my life. I signed a contract to build 150 kitchens at Patrick Air Force Base in Cocoa Beach. This was the largest Federal contract I ever had. I knew this contract would help my business grow, instead, this contract would bring me to the edge of bankruptcy and totally destroy my life and business.

My advice to people suing under the Miller Act would be: If you are owed up to $200,000 forget trying to get it for it will cost you much more than that.

My story started in October 29, 1981 a Federal Government job bonded by a Payment Bond Form 25–A this was signed August 31, 1981 by William Jackson, Jim Boldock and D.J. Barclay at that time they were worth $1,852,000 to $953,899. This was a laugh to people in Kentucky. Farm land was not worth that much. Besides there were first mortgages already on the land. They also used jewelry, personal household, and farm equipment, live stock also. And even their homes which no one can sell. Pretty good bond for who. Surely not for us.

The job was total chaos. Construction of the job was different every delivery. The cabinets were built as we were told. Even with my brother and another employee to witness the drop off of each delivery. Weeks later they still would accuse us of not setting off enough cabinets. During the middle of the job there was a dispute of presidency of the corporation of D.J. Barclay. The fight was between son and father-in-law. Before the job ended there was still 46 kitchens. This was two semitruck trailers full of cabinets. This contractor was so afraid we would quit him because of his threats that he went as far as to break in my shop through a side glass. He then crawled or climbed into the building and took inventory. All the cabinets were there. They were sent C.O.D. by the truck driver when the truck driver looked for the check in the envelope there was a check for $1,000. With this information we sent the cabinets to a storage. Barclay ordered that the cabinets be looked at so at that they opened the truck and took out cabinets that Barclay had seen days before.

Still no check was received. The cabinets were sent back.

Weeks went by, then we called John Hammerlink and Art Williams and asked if they knew what was going on. They were told the cabinets hadn't been built.

Then we hired attorney Nick Peterson for a new agreement to settle for much less because we knew we would spend much more than what it was worth. There were many more that took him to court before this and still they lose with a worthless judgment.

Then we hired attorney Lewis Peirce and also signed the Miller Act October 13, 1982. After a few months of starting litigation Mr. Peirce contacted another attorney Bull and Nelson. They then appointed Jim Mize. He then sent a letter to John Hammerlink to withhold monies to D.J. Barclay this failed. Then a hearing was heard on the base the government told us to say that it never existed. Then they claimed it 1 year later.

Still after all of our proof that the government told us to get they would not help us. Still thanksgiving day they awarded $575,000 to D.J. Mchin Con. case was second we let them go first so they would not lose their homes. There was more proof D.J. bidded under three names D.J., J. Mar, and Mike Howel. The land also had first mortgages this was a big minus for us for when they won a judgment it was worthless. The attorney wasn't paid so this made it difficult for my case.

I was having problems at home my father's cancer had showed up that thanksgiving day 1983 and he died September 2, 1984.

January 1986 we tried for an SBA loan this was a great problem. For months we brought financial statements, appraisals on the home and shop. We were approved

May 9, 1986 by Burt Howel. Bob Harris was in contact with me and asked Burt if it would be much longer. At this Burt said that getting Senator Chiles into this would only hinder things. Then we met Diane French and weeks later the loan was disapproved.

So finally court day July 7, 1986 Jim Mize called me up and asked for $25,000 before court or he would not represents us. This took up a great deal of our time. We had to go in front of the magistrate judge and represented my self and Jim Mize himself. He wanted to withdraw because I did not have $25,000 to pay him. The judge saw he had been paid enough so the judge said that Jim Mize was to represent me.

Before this one year ago Jim said under my contract that the other side was to pay attorney fees. Signed by D.J. Barclay. The firm that Jim Mize worked for is now part owner of Bull & Mize. To say the least Jim Mize did not represent me. Instead Guy Haggard 27 and looked to be his first case. So Saturday two days before court we told Guy all about our 5 years of law suits. Guy did the best he could. Jim Mize did not say a word to us you could only imagine the pressure that I and my brother had experiencing. Like the judge said it was a college episode. The two attorneys had already agreed that each was to pay their own attorney fees. This was not the deal for in the contract D.J. Barclay signed said upon any litigation he the buyer was to pay all attorney fees. Besides all of the litigation, paper work that Jim Mize sent in, the judge said that under the Miller Act that D.J. Barclay was to pay the attorney fees. Jury's made their decision. They asked before to see a chart which had what we were asking for. And the judge said no. Because it was not entered into as evidence. So the jury awarded us $41,962.63 plus interest at 6.18 per annum. Plus prejudgment interest of $19,000. The judge denied the prejudgment interest so we lost that much more. We appealed this at the last second and being desperate hired Nick Peterson who knew nothing about appeals and lost the appeal. Nick said that the court did not even look at the appeal. The collection of this money has been the same.

Thank you.

E&C/9K4C
PATRICK AFB, FL 32925-5472

DESTIN CABINETS
ATTN: MR LARRY HUGHES
344 MOUNTAIN DRIVE
DESTIN, FL 32541

JOHN M. HAMMERING
Chief, Construction and A&E
Contract Branch

3 Atch
1. SF 25-A
2. SF 28
3. SF 28

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS EASTERN SPACE AND MISSILE CENTER (AFSC)
PATRICK AIR FORCE BASE, FLORIDA 32925

REPLY TO ATTN OF: PKMC (305/494-6341)

4 December 1986

SUBJECT: Contract F08650-81-C-0158, Copies D. J. Barclay's Individual Sureties and Payment Bond

TO: Destin Cabinets
Attn: Mr Larry Hughes
344 Mountain Drive
Destin, FL 32541

Pursuant to your request to Mr Art Williams, please find attached the copies of the Individual Sureties and Payment Bond.

JOHN H. HAMMERING
Chief, Construction and A&E
Contract Branch

3 Atch
1. SF 25-A
2. SF 28
3. SF 28

STANDARD FORM 25-A
JUNE 1966 EDITION
GENERAL SERVICES ADMINISTRATION
FED PROC REG (41 CFR) 1-16.801

PAYMENT BOND

(See Instructions on reverse)

33-283

DATE BOND EXECUTED (Must be same or later than date of contract)
31 August 1981

PRINCIPAL (Legal name and business address)

D. J. Barclay & Co., Inc.
P. O. Box 7130
Jacksonville, Florida 32210

TYPE OF ORGANIZATION ("X" one)

☐ INDIVIDUAL ☐ PARTNERSHIP
☐ JOINT VENTURE ☒ CORPORATION

STATE OF INCORPORATION
Alabama

SURETY(IES) (Name(s) and business address(es))

William C. Jackson, Rt.8, Bowling Green, Ky.
Jim E. Baldock, Rt.2, Bowling Green, Ky.42101

PENAL SUM OF BOND			
MILLION(S)	THOUSAND(S)	HUNDRED(S)	CENT(S)
	868	200	

CONTRACT DATE	CONTRACT NO
07 Aug 81	F08650-81-C-015[illegible]

KNOW ALL MEN BY THESE PRESENTS, That we, the Principal and Surety(ies) hereto, are firmly bound to the United States of America (hereinafter called the Government) in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally: *Provided*, That, where the Sureties are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into the contract identified above;

NOW, THEREFORE, if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety(ies) being hereby waived, then the above obligation shall be void and of no effect.

IN WITNESS WHEREOF, the Principal and Surety(ies) have executed this payment bond and have affixed their seals on the date set forth above.

PRINCIPAL

	1	2	
Signature(s)	D J Barclay (Seal)	(Seal)	Corporate Seal
Name(s) & Title(s) (Typed)	D. J. Barclay President		

INDIVIDUAL SURETY(IES)

	1	2
Signature(s)	William C Jackson (Seal)	Jim E Baldock (Seal)
Name(s) (Typed)	William C. Jackson	Jim E. Baldock

CORPORATE SURETY(IES)

	Name & Address	STATE OF INC.	LIABILITY LIMIT
SURETY A			
	Signature(s)	1	2
	Name(s) & Title(s) (Typed)	1	

BEST COPY AVAILABLE

CORPORATE SURETY(IES) (Continued)

SURETY B	Name & Address		STATE OF INC.	LIABILITY LIMIT
	Signature(s)	1	2	Corporate Seal
	Name(s) & Title(s) (Typed)	1	2	
SURETY C	Name & Address		STATE OF INC.	LIABILITY LIMIT
	Signature(s)	1	2	Corporate Seal
	Name(s) & Title(s) (Typed)	1	2	
SURETY D	Name & Address		STATE OF INC.	LIABILITY LIMIT
	Signature(s)	1	2	Corporate Seal
	Name(s) & Title(s) (Typed)	1	2	
SURETY E	Name & Address		STATE OF INC.	LIABILITY LIMIT
	Signature(s)	1	2	Corporate Seal
	Name(s) & Title(s) (Typed)	1	2	
SURETY F	Name & Address		STATE OF INC.	LIABILITY LIMIT
	Signature(s)	1	2	Corporate Seal
	Name(s) & Title(s) (Typed)	1	2	
SURETY G	Name & Address		STATE OF INC.	LIABILITY LIMIT
	Signature(s)	1	2	Corporate Seal
	Name(s) & Title(s) (Typed)	1	2	

INSTRUCTIONS

1. This form, for the protection of persons supplying labor and material, shall be used whenever a payment bond is required under the act of August 24, 1935, 49 Stat. 793, as amended (40 U.S.C. 270a–270e). There shall be no deviation from this form without approval by the Administrator of General Services.

2. The full legal name and business address of the Principal shall be inserted in the space designated "Principal" on the face of the form. The bond shall be signed by an authorized person. Where such person is signing in a representative capacity (e.g., an attorney-in-fact), but is not a member of the firm, partnership, or joint venture, or an officer of the corporation involved, evidence of his authority must be furnished.

3. (a) Corporations executing the bond as sureties must appear on the Treasury Department's most current list (Circular 570 as amended) of approved sureties and must be acting within the limitations listed therein. Where more than a single corporate surety is involved, the name and address of each such surety, and the amount of liability limit for each, shall be inserted in the spaces (Surety A, Surety B, etc.) headed "CORPORATE SURETY(IES)", and in the space designated "SURETY(IES)" on the face of this form only the letter identification of the Sureties shall be inserted.

(b) Where individual sureties execute the bond, they shall be two or more responsible persons. A completed Affidavit of Individual Surety (Standard Form 28), for each individual surety, shall accompany the bond. Such sureties may be required to furnish additional substantiating information concerning their assets and financial capability as the Government may require.

4. Corporations executing the bond shall affix their corporate seals. Individuals shall execute the bond opposite the word "Seal", and, if executed in Maryland, New Hampshire, shall also affix an adhesive seal.

5. The name of each person [illegible]

BEST COPY AVAILABLE

STANDARD FORM
JUNE 1966 EDITION
GENERAL SERVICES ADMINISTRATION
FPR PROC REG 101 CFR 1-16.801

AFFIDAVIT OF INDIVIDUAL SURETY

(See Instructions on Reverse)

STATE OF Kentucky
COUNTY OF Warren } ss.

I, the undersigned, being duly sworn, depose and say that I am one of the sureties to the attached bond, that I am a citizen of the United States (or a permanent resident of the place where the contract and bond are executed as provided in paragraph 3 of the Instructions on reverse), and of full age and legally competent; that I am not a partner in any business of the principal on the bond or bonds on which I appear as surety, that the information herein below furnished is true and complete to the best of my knowledge. This affidavit is made to induce the United States of America to accept me as surety on the attached bond.

1. NAME (First, middle, last) (Type or print)	2. HOME ADDRESS (Number, Street, City, State, ZIP Code)
Joyce Jackson William C. Jackson	Rt. 8 McFarland Lane Bowling Green, Ky. 42101
3. TYPE AND DURATION OF OCCUPATION	4. NAME OF EMPLOYER (If self-employed, so state)
Agriculture & Retail Liquor Dealer	Self Employed
5. BUSINESS ADDRESS (Number, Street, City, State, ZIP Code)	6. TELEPHONE NO.
218 Old Louisville Road Bowling Green, Ky. 42101	HOME— 502 843-6502 BUSINESS—502 843-9253

7. THE FOLLOWING IS A TRUE REPRESENTATION OF MY PRESENT ASSETS, LIABILITIES, AND NET WORTH AND DOES NOT INCLUDE ANY FINANCIAL INTEREST I HAVE IN THE ASSETS OF THE PRINCIPAL ON THE ATTACHED BOND.

a. Fair value of solely owned real estate*	$2,188,500
b. All mortgages or other encumbrances on the real estate included in Line a	492,205
c. Real estate equity (subtract Line b from Line a)	1,696,295
d. Fair value of all solely owned property other than real estate*	161,000
e. Total of the amounts on Lines c and d	1,857,295
f. All other liabilities owing or incurred not included in Line b	5,193
g. Net worth (subtract Line f from Line a)	$1,852,102

*Do not include property exempt from execution and sale for any reason. Surety's interest in community property may be included if not so exempt.

8. LOCATION AND DESCRIPTION OF REAL ESTATE OF WHICH I AM SOLE OWNER, THE VALUE OF WHICH IS INCLUDED IN LINE (a), ITEM 7 ABOVE

Farm 226 Acres Barren County, Ky. — Residence , McFarland Lane Bowling Green, Ky.
Farm 97 " " " "
Farm 105 " " " "
Farm 140 " " " "
Farm 40 " Hart " "
Farm 54 " Barren " "

Amount of assessed valuation of above real estate for taxation purposes: 2,188,500

9. DESCRIPTION OF PROPERTY INCLUDED IN LINE (d), ITEM 7 ABOVE (List the value of each category of property separately)

Farm Equipment — Personal Household
Live Stock — Jewelry

10. ALL OTHER BONDS ON WHICH I AM SURETY (Show character and amount of each bond: if none, so state)

None

11. SIGNATURE: Joyce Jackson
William C. Jackson

12. BOND AND CONTRACT TO WHICH THIS AFFIDAVIT RELATES (Where appropriate)

SUBSCRIBED AND SWORN TO BEFORE ME AS FOLLOWS:

DATE (As to acknowledgment)			CITY
MONTH	DAY	YEAR	
September	4	1981	Cave City

NAME AND TITLE OF OFFICIAL ADMINISTERING OATH (Type or print): Ruby I. Combs, Notary

SIGNATURE: Ruby I. Combs

EXPIRES: 3-4-85

Notary Public, Kentucky State at Large
My Commission Expires March 4, 1985

BEST COPY AVAILABLE

CERTIFICATE OF SUFFICIENCY

I Hereby Certify, That the surety named herein is personally known to me; that, in my judgment, said surety is responsible, and qualified to act as such; and that, to the best of my knowledge, the facts stated by said surety in the foregoing affidavit are true.

NAME (Type or print)	SIGNATURE
Sandra F. Ross	Sandra F. Ross
OFFICIAL TITLE	
Asst. Vice-President	New Farmers National Bank
ADDRESS (Number, Street, City, State, ZIP Code)	
Cave City, Kentucky 42127	

INSTRUCTIONS

1. This form shall be used whenever sureties on bonds to be executed in connection with Government contracts are individual sureties, as provided in governing regulations (see 41 CFR 1-10.203, 1-16.801, 101-45.3). There shall be no deviation from this form except as so authorized (see 41 CFR 1-1.009, 101-1.110).

2. A corporation, partnership, or other business association or firm, as such, will not be accepted as a surety, nor will a partner be accepted as a surety for co-partners or for a firm of which he is a member. Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stockholdings therein. In arriving at the net worth figure in Item 7 on the face of this affidavit an individual surety will not include any financial interest he may have in the assets of the principal on the bond which this affidavit supports.

3. An individual surety shall be a citizen of the United States, except that if the contract and bond are executed in any foreign country, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, or any other territory or possession of the United States, such surety need only be a permanent resident of the place of execution of the contract and bond.

4. The individual surety shall show net worth in a sum not less than the penalty of the bond by supplying the information required on the face hereof, under oath before a United States commissioner, a clerk of a United States Court, or notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal, it shall be affixed, otherwise the proper certificate as to his official character shall be furnished.

5. The certificate of sufficiency shall be signed by an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned. Further certificates showing additional assets, or a new surety, may be required to assure protection of the Government's interest. Such certificates must be based on the personal investigation of the certifying officer at the time of the making thereof, and not upon prior certifications.

(Back of SF 28 June 66)

BEST COPY AVAILABLE

STANDARD FORM 28
JUNE 1966 EDITION
GENERAL SERVICES ADMINISTRATION
PRO. PROC. REG. (41 CFR) 1-16.801

AFFIDAVIT OF INDIVIDUAL SURETY

(See Instructions on Reverse)

STATE OF: Kentucky
COUNTY OF: Warren
ss.

I, the undersigned, being duly sworn, depose and say that I am one of the sureties to the attached bond; that I am a citizen of the United States (or a permanent resident of the place where the contract and bond are executed as provided in paragraph 3 of the instructions on reverse); and of full age and legally competent; that I am not a partner in any business of the principal on the bond or bonds on which I appear as surety; that the information herein below furnished is true and complete to the best of my knowledge. This affidavit is made to induce the United States of America to accept me as surety on the attached bond.

1. NAME (First, middle, last) (Type or print)
Dorothy Baldock
Jim E, Baldock

2. HOME ADDRESS (Number, Street, City, State, ZIP Code)
Rt. 9 Plano Road
Bowling Green, Kentucky 42101

3. TYPE AND DURATION OF OCCUPATION
Farmer-Business Mar. 35 Years

4. NAME OF EMPLOYER (If self-employed, so state)
Self Employed

5. BUSINESS ADDRESS (Number, Street, City, State, ZIP Code)
Rt. 9 Plano Road
Bowling Green, Kentucky 42101

6. TELEPHONE NO.
HOME— 502 842-5909
BUSINESS— 502 842-5909

7. THE FOLLOWING IS A TRUE REPRESENTATION OF MY PRESENT ASSETS, LIABILITIES, AND NET WORTH AND DOES NOT INCLUDE ANY FINANCIAL INTEREST I HAVE IN THE ASSETS OF THE PRINCIPAL ON THE ATTACHED BONDS

a. Fair value of solely owned real estate*	$ 935,750.00
b. All mortgages or other encumbrances on the real estate included in Line a	95,961.00
c. Real estate equity (subtract Line b from Line a)	839,789.00
d. Fair value of all solely owned property other than real estate*	114,110.00
e. Total of the amounts on Lines c and d	953,899.00
f. All other liabilities owing or incurred not included in Line b	-0-
g. Net worth (subtract Line f from Line e)	$ 953,899.00

*Do not include property exempt from execution and sale for any reason. Surety's interest in community property may be included if not so exempt.

8. LOCATION AND DESCRIPTION OF REAL ESTATE OF WHICH I AM SOLE OWNER, THE VALUE OF WHICH IS INCLUDED IN LINE (a), ITEM 7 ABOVE

Farm, Home Place 217 Acres Warren County, Ky.
Farm 107 Acres " " "
Farm 102 Acres " " "
Farm 56 Acres " " "

Amount of assessed valuation of above real estate for taxation purposes: $ 953,750.00

9. DESCRIPTION OF PROPERTY INCLUDED IN LINE (d), ITEM 7 ABOVE (List the value of each category of property separately)

Notes and Stock
Farm Equipment
Live Stock

10. ALL OTHER BONDS ON WHICH I AM SURETY (State character and amount of each bond; if none, so state)

None

11. SIGNATURE
Dorothy Baldock
Jim E Baldock

12. BOND AND CONTRACT TO WHICH THIS AFFIDAVIT RELATES (Where appropriate)

SUBSCRIBED AND SWORN TO BEFORE ME AS FOLLOWS:

DATE OATH ADMINISTERED — MONTH: 5 | DAY: 31 | YEAR: 81

CITY: Bowling Green

NAME AND TITLE OF OFFICIAL ADMINISTERING OATH (Type or print)
M. D. CARTER

SIGNATURE
W. D. Carter

My Commission Exp:

28-103

BEST COPY AVAILABLE

CERTIFICATE OF SUFFICIENCY

I Hereby Certify, That the surety named herein is personally known to me; that, in my judgment, said surety is responsible, and qualified to act as such; and that, to the best of my knowledge, the facts stated by said surety in the foregoing affidavit are true.

NAME (Type or print)

Bruce T. Shaffitt

SIGNATURE

Bruce T. Shaffitt

OFFICIAL TITLE

Vice President & Cashier

ADDRESS (Number, Street, City, State, ZIP Code)

P. O. Box 1020-C, Bowling Green, Kentucky 42101

INSTRUCTIONS

1. This form shall be used whenever sureties on bonds to be executed in connection with Government contracts are individual sureties, as provided in governing regulations (see 41 CFR 1-10.203, 1-16.801, 101-45.3). There shall be no deviation from this form except as so authorized (see 41 CFR 1-1.009, 101-1.110).

2. A corporation, partnership, or other business association or firm, as such, will not be accepted as a surety, nor will a partner be accepted as a surety for co-partners or for a firm of which he is a member. Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stockholdings therein. In arriving at the net worth figure in Item 7 on the face of this affidavit an individual surety will not include any financial interest he may have in the assets of the principal on the bond which this affidavit supports.

3. An individual surety shall be a citizen of the United States, except that if the contract and bond are executed in any foreign country, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, or any other territory or possession of the United States, such surety need only be a permanent resident of the place of execution of the contract and bond.

4. The individual surety shall show net worth in a sum not less than the penalty of the bond by supplying the information required on the face hereof, under oath before a United States commissioner, a clerk of a United States Court, or notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal, it shall be affixed, otherwise the proper certificate as to his official character shall be furnished.

5. The certificate of sufficiency shall be signed by an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the department or establishment concerned. Further certificates showing additional assets, or a new surety, may be required to assure protection of the Government's interest. Such certificates must be based on the personal investigation of the certifying officer at the time of the making thereof, and not upon prior certifications.

(Back of SF 28 June 66)

GPO 1966 OP—250-143 (10-63

KENTUCKY STATE BANK

Phone 502 - 237-3126
SCOTTSVILLE, KENTUCKY
42164

FILED

JUN 22 3 04 PM '87

CLK.
COURT
D.C.

June 19, 1987

Warren Circuit Court
Division No. II
Bowling Green, KY 42101

Re: Irrevocable Letter of Credit No. 100
James E. Baldock and Dorothy Baldock

We hereby authorize you to draw on Kentucky State Bank of Scottsville, Kentucky, for the account of James E. Baldock and Dorothy Baldock in an amount not to exceed One Hundred Twenty-Five Thousand Dollars ($125,000.00) under the following terms and conditions:

I.

This Irrevocable Letter of Credit shall become effective June 19, 1987, and remain in force and effect until this case is finally resolved or until June 19, 1988, whichever comes first.

II.

This Irrevocable Letter of Credit may be drawn upon by presentation of your draft(s) drawn on Kentucky State Bank at its office in Scottsville, Kentucky.

III.

Drafts under this Irrevocable Letter of Credit must contain the clause, "drawn under Irrevocable Letter of Credit No. 100 of Kentucky State Bank, June 19, 1987."

IV.

This Letter of Credit is subject to the Uniform Customs and Practices for Documentary Credits, (1984 revision), International Chamber of Commerce, UCP 400.

We hereby agree with you that drafts drawn under and in compliance with the terms of this Irrevocable Letter of Credit shall be duly honored upon delivery of documents specified above.

Very truly yours,

Chairman of the Board

President

CIVIL ACTION NO. 85-CI-541

WARREN CIRCUIT COURT
DIVISION NO. II

MCGHIN CONSTRUCTION COMPANY — PLAINTIFF

VS. SUPERSEDEAS BOND

WILLIAM C. JACKSON,
MRS. WILLIAM C. JACKSON,
MR. JIM E. BALDOCK and
MRS. JIM E. BALDOCK — DEFENDANTS

The undersigned, James E. Baldock and Dorothy Baldock, as principals, and the Kentucky State Bank of Scottsville, Kentucky, as surety, through its irrevocable letter of credit dated June 17, 1987, which is attached hereto and incorporated herein and is issued in favor of the Warren Circuit Court, Division No. II, are bound to pay unto the Warren Circuit Court, Division No. II, and McGhin Construction, as Plaintiff/Appellee, the principal sum of $40,247.95, which represents the amount of the judgment entered in this action on September 20, 1985 offset by the sum of $60,000.00 representing payment made by the Defendants/Appellants Baldocks to the Plaintiff/Appellee during the pendency of this action, plus interest and costs.

The Defendants/Appellants Baldocks agree that their liability and the liability on the irrevocable letter of credit issued by the Kentucky State Bank of Scottsville, Kentucky to this Court, which is attached hereto and incorporated herein may be enforced in this Court on motion, and such notice of moti[illegible]

the Court may prescribe may be served upon the Clerk of this Court as agent for the Kentucky State Bank of Scottsville, Kentucky.

FURTHER, the Defendants/Appellants Baldocks have appealed from the final judgment of the Warren Circuit Court rendered against them on April 21, 1987, styled "Order Lifting Stay of Execution on Judgment" and executes and delivers to this Court this supersedeas bond on the condition that if the Defendants/Appellants Baldocks shall satisfy the judgment entered against them on September 25, 1985 together with costs and interest thereon and if for any reason the appeal is dismissed or the judgment is affirmed and they shall satisfy in full any modification of said judgment and such costs, interest and damages, including damages for delay, as any appellate court may adjudge and award, then this obligation shall be null and void; otherwise, it shall remain in full force and effect.

This ____ day of June, 1987.

James E Baldock
JAMES E. BALDOCK, PRINCIPAL
Route 9
Bowling Green, KY 42101

Dorothy Baldock
DOROTHY BALDOCK, PRINCIPAL
Route 9
Bowling Green, KY 42101

Approved:

This _____ day of _____, 1987.

_____

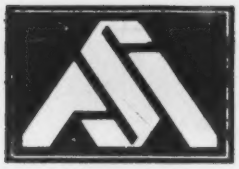
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was this day placed in the U.S. Mail addressed to the following:

Hon. Phillip I. Huddleston
Hon. Stephen A. Wilson
Huddleston Brothers
1032 College Street
P. O. Box 2130
Bowling Green, KY 42102-2130

This 22nd day of June, 1987.

CHARLES E. ENGLISH
JANET S. JOBE



Statement of

AMERICAN SUBCONTRACTORS ASSOCIATION

to the

SUBCOMMITTEE ON FEDERAL SPENDING, BUDGETING, AND ACCOUNTING

of the

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

on

PERSONAL SURETIES UNDER THE MILLER ACT: INADEQUATE PAYMENT PROTECTION FOR SMALL BUSINESS CONSTRUCTION SUBCONTRACTORS

August 11, 1987

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
1004 DUKE STREET, ALEXANDRIA, VA 22314-3512
(703) 684-3450

Statement on
Inadequate Payment Protection for
Small Business Construction Subcontractors
Under the Miller Act

The American Subcontractors Association is a national trade association with more than 7,000 firms representing all major construction trades in 55 chapters. In addition to its individual company members, ASA represents 15 other specialty trade associations with members of their own (See Appendix A).

ASA is the only national organization that speaks exclusively for the interests of construction subcontractors. ASA is dedicated to improving general business conditions for subcontractors through unified and cooperative actions.

Many ASA members perform construction for the federal government. Sometimes they serve as prime contractors, contracting directly with the federal government. More often, they serve as subcontractors, dealing with the government only through a prime contractor. In both situations, these specialty trade contractors have a direct and real interest in the federal government's construction program, particularly their ability to get paid for work performed.

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
1004 DUKE STREET, ALEXANDRIA, VA 22314-3512
(703) 684-3450

Congress recognized this issue when it enacted the Miller Act in 1935. The Miller Act provides for a performance bond for the protection of the government and a payment bond for the protection of the subcontractor or supplier on a federal construction project. At the time of enactment and later amendment, the Miller Act was considered to be a good law and, up to a point, it has been.

But the protection afforded by the Miller Act, as it stands today, is a snare and a delusion. Any subcontractor who has had experience with a suit on a Miller Act bond, will resort to it only when the prime contractor is hopelessly insolvent.

ASA believes that the Miller Act must be amended in several areas if it is to once again live up to the expectations of Congress--and more importantly, to protect the subcontractor and supplier on federal construction projects.

Require Treasury-Approved Bonds. First, ASA proposes that the Miller Act be amended to eliminate alternative securities to corporate bonds and to permit only bonds issued by surety companies approved by the U.S. Treasury Department.

Treasury already is required to approve the surety companies that issue bonds on federal projects. However, the regulations implementing the Miller Act also allow a contractor to post other types of securities in lieu of a corporate bond.

These alternatives include certified or cashier's checks, bank drafts, money orders, U.S. bonds or notes, and even individual sureties.

The standards for such alternatives no where meet the strict standards for corporate sureties. A contractor who posts such an alternative to a corporate surety bond may not have been "prequalified" by an experienced agent and the liquidity of the "security" is not assured. In addition, the administration of such alternative securities is burdensome for the responsible government agency.

When alternative securities to corporate bonds are used on federal construction, subcontractors are at a greater risk since the government's first priority is assuring completion of the project--not payment of subcontractors who may have performed prior to the general contractor's default.

Require the Payment Bond Equal the Performance Bond. ASA also recommends that the Miller Act be amended to provide that the payment bond be at least equal to the performance bond.

Under the Miller Act, the government is protected by a performance bond in an amount the contracting officer "deems adequate for the protection of the United States." That amount is usually 100%.

Subcontractors, however, are protected by a payment bond which is only one-half of the contract amount if the contract is less than $1 million; 40% of the contract amount if the contract is between $1 million and $5 million; and a $2.5 million maximum if the contract is for more than $5 million. The maximum dollar protection for a subcontractor under the Miller Act has been severely eroded by inflation. In any event, ASA believes that subcontractors deserve the same protection as the government is now granted under the Act.

Place an Affirmative Obligation on the Government. ASA further recommends that the Miller Act be amended to place an affirmative obligation on the government to assure prime contractor compliance with the Miller Act.

In the event that a Miller Act bond is not posted by the prime contractor, the contract is voidable and can be terminated by the government at its option. If the government does not terminate the contract, and the contractor defaults, the subcontractor claimant has no recourse to collect the money it is owed.

ASA believes it is wrong--and an abrogation of congressional intent--for a subcontractor to suffer a financial loss because of the government's failure to enforce the Miller Act.

Prohibit Waiver of Rights. In addition, ASA recommends that the Miller Act be amended to nullify any contract provision that would directly or indirectly waive a subcontractor's rights under the Miller Act.

Some agreements between a prime contractor and subcontractor require the subcontractor to waive these rights. Such subcontract provisions often are designed to protect the prime contractor and his surety by providing them with defenses on a bonded job. Given the uneven negotiating power between a prime contractor and subcontractor, ASA believes that such provisions--which operate to the legal and practical detriment of the subcontractor--should be against public policy.

Allow Notice by Certified Mail. ASA recommends that the Miller Act be amended to allow notices to be sent by certified or other system of mail by which receipt can be proven. The Miller Act requires that notice be given by "registered mail". Although most courts have excused this requirement when it is shown that a prime contractor actually received notice, it still may provide the surety with a technical defense to an otherwise recoverable Miller Act suit.

End "Premature Notice". The Miller Act requires certain subcontractors and suppliers to provide written notice to the prime contractor within 90 days from the date on which he performed the last labor or supplied the last of the material for which his claim is made. Some courts have ruled that notice given before the actual final day of work is premature and therefore dismissed the suit. These court rulings provide the prime contractor and his surety with a technical defense to an otherwise recoverable Miller Act suit.

ASA recommends that the Miller Act be amended to require notice "not later than 90 days" (rather than "within 90 days") from the date of last furnishing.

Modify the Waiting Period for Filing Suit. The Miller Act requires a claimant to wait 90 days after he last performs labor or furnishes material on the project before filing suit. Although most courts have excused this requirement, it still may provide a surety with a technical defense to an otherwise recoverable Miller Act suit.

Thus, ASA recommends that the Miller Act be amended to allow waiver of the 90 day waiting period when the subcontractor receives a denial of his claim from the prime contractor. There is no reason to require a subcontractor to wait 90 days when he knows that payment will not be forthcoming during that period.

Extend the Period for Filing Suit. The Miller Act requires a subcontractor to file suit within one year from his last date of furnishing labor or material on a project. This is a serious problem, particularly for "early finishing" trades on projects where retainage is withheld.

For example, a subcontractor whose work may be completed during the first few months of a two or three-year project, may have his final payment delayed for several years beyond his completion date. If he files suit within one year, the prime contractor and the surety may defend on the ground that the money is not yet due. If the subcontractor waits beyond the one year, he loses all rights under the Miller Act.

Therefore, ASA recommends that the Miller Act be amended to allow the filing of suit up to one-year after anyone has furnished labor or material on the project.

Allow Attorneys' Fees and Interest. Many assume that a prime contractor or his surety settles payment claims upon receipt of notice and after investigation of the merits and validity of the claim. However, there have been many cases where the surety has raised groundless and technical defenses to a claim.

So, finally, ASA recommends that that the Miller Act be amended to allow the court to award attorneys' fees and interest

to a subcontractor if the defenses raised against the claim are held groundless. Such amendment also should allow the surety to recover attorneys' fees if the subcontractor's suit is held frivolous.

ASA has prepared a bill that addresses each of the above recommended amendments to the Miller Act. That bill is attached to this statement for your consideration (Attachment B).

Appendix A

American Subcontractors Association
National Associations' Council Members

ADSC: The International Association of Foundation Drilling Contractors

American Architectural Manufacturers Association

American Institute of Steel Construction

Architectural Precast Association

Association of the Wall & Ceiling Industries - International

Ceiling and Interior Systems Construction Association

Concrete Sawing & Drilling Association

Institute of the Ironworking Industry

Insulation Contractors Association of America

National Association of Elevator Contractors

National Glass Association

National Ornamental & Miscellaneous Metals Association

National Roofing Contractors Association

Painting and Decorating Contractors of America

100th Congress
1st Session

Attachment B

S.

IN THE SENATE OF THE UNITED STATES

A BILL

To amend the Miller Act to guarantee completion of Federal Government construction projects and to protect persons supplying labor and materials on such construction.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. This Act may be cited as the "Miller Act Amendments of 1987".

Sec. 2. The Congress finds that --

(1) the Miller Act, for many years, has operated to protect both the Federal Government and the persons supplying labor and materials on its construction projects;

(2) nonetheless, the changing nature of the construction industry and the surety industry, as well as a series of judicial rulings have weakened the protections

for the Government and its subcontractors and suppliers that Congress intended when the Act was enacted;

(3) as a result,

(A) neither the Government nor its subcontractors and suppliers are protected adequately when a prime contractor is permitted to post a bond issued by other than a corporate surety;

(B) the penal amount of the bond sometimes is not adequate to protect subcontractors and suppliers;

(C) failure of contracting officers to require an adequate bond can jeopardize both the Government and its subcontractors and suppliers; and

(D) technical defenses raised by prime contractors and their sureties jeopardize the recovery of otherwise valid claims under the Miller Act.

Sec. 3. That section 1 of the Act of August 24, 1935 (40 U.S.C. 270a, 49 Stat. 794), is amended -

(1) by deleting all of subsection (a) after "'contractor';" and inserting:

(1) A performance bond with an acceptable surety or sureties holding a certificate of

authority under sections 9304 and 9308 of Title 31 of the United States Code, and in a form satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with an acceptable surety or sureties holding a certificate of authority under sections 9304 and 9308 of Title 31 of the United States Code, and in form satisfactory to the officer awarding such contract, and in an amount equal to the performance bond, for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person.

(2) by adding as subsection (e) the following:

> If the payment bond required by this Act is not furnished in the manner and form required under this Act, the United States shall be liable to all persons supplying labor or material in the prosecution of the work who would have been entitled to the protection of the bond, for any loss resulting to them from such failure.

(3) by adding as subsection (f) the following:

No promise or agreement by any person entitled to recover under a payment bond to waive any right under this Act shall be valid if made or entered into prior to the date of accrual of the right to sue on said bond.

That section 2 of the Act of August 24, 1985 (40 U.S.C. 270b; 49 Stat. 794), is amended -

(1) by striking out "within ninety days from" in the first sentence of subsection (a) and inserting in lieu thereof "not later than ninety days after."

(2) by striking out "registered mail" in the last sentence of the subsection (a) and inserting in lieu thereof "registered mail, certified mail, express mail, or other method of delivery which requires proof of receipt."

(3) by inserting after the last sentence of subsection (a) the following sentence: "Suit upon a payment bond shall not be dismissed on the ground that it was filed prior to the ninetieth day after the last of the labor was performed or material was furnished, provided such person suing shall have received from the contractor a denial, in whole or in part, of the claim."

(4) by striking out "him" in the first sentence of subsection (b) and inserting in lieu thereof "anyone".

(5) by inserting after the last sentence (b) the following sentences: "Upon a finding that suit against a contractor or surety is frivolous or defenses asserted are groundless, the prevailing party may be awarded attorneys' fees, court costs and interest established by the Secretary of the Treasury pursuant to Public Law 92-41 for the Renegotiation Board, as appropriate.

Sec. 4. The amendments made by this Act shall be applicable to any contract entered into 30 days after the date of the enactment of this Act.

AMERICAN INSURANCE ASSOCIATION

1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 293-3010

September 15, 1987

Daisy M. Minter
Chief Clerk
Sub-Committee of Federal Spending, Budget and Accounting
Rm SD-326, Dirkson Senate Office Building
Washington, D.C 20510-6250

RE: Testimony on Personal Sureties Under the Miller Act
AIA File US;118-70

Dear Ms. Minter:

I have received my copy of the testimony transcript from the August 11, 1987 hearing convened by Senator Chiles in Tampa, FL. Enclosed you will find my copy. I have marked corrections to the best of my abilities. However, I must advise you that the transcript beginning at page 62 is not very accurate. Therefore, I would like to offer brief comments of correction in the body of this letter. (I cannot reconstruct my testimony; even reading the transcript does not help.) As to the SBA program, Senator Chiles was interested in knowing whether the SBA program was helpful in providing bonds to those who were having difficulty finding bonds. The comments I made in regard to the SBA program explained the SBA program was working well but it was limited to certain sized contracts. That is, the SBA can only guarantee bonds on contracts ranging from 0 up to $1,250,000. Therefore, the SBA program only works in this limited area. The second area which I wanted to clarify for the Senator's benefit was the issue of alternative forms of security in lieu of surety bonds. That is, often times people believe that cash or a letter of credit should be considered as acceptable alternatives to the use of surety bonds in the construction process. I indicated that the AIA's position on that issue was that cash and/or letters of credit are not equal, acceptable alternatives to surety bonds for public construction. To explain the entire reason for this in this letter would be too lengthy and contrary to your request. Therefore, I remain available to respond to any additional questioning on this issue which would be desired by the subcommittee.

I hope this cover letter is of some help to you in performing your duties.

Very Truly Yours,

Joseph G. Perry
Counsel

JGP/dh/0653p

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • TELEX 279 354 AGC WSH

RICHARD E. HALL, *President* DANA HUESTIS, *Senior Vice President* JAMES W. SUPICA, *Vice President*

J. HUNT BENOIST, *Treasurer* HUBERT BEATTY, *Executive Vice President*

December 18, 1986

Mr. Lawrence J. Rizzi
Chairman
Civilian Agency Acquisition Council
FAR Secretariat
General Services Administration
18th & F Streets, N.W.
Washington, D.C. 20405

Dear Mr. Rizzi:

The Associated General Contractors of America urges amendment to Subsection 28.202-2, Individual Sureties, of the Federal Acquisition Regulation (FAR). AGC requests that the criteria applied to corporate sureties for approval to be contained in Treasury Department Circular 570, which lists companies holding certificates of authority as acceptable sureties on federal bonds, also be applied to individual sureties.

Such amendment is necessary to eliminate abuses that may occur by the use of individual sureties. These abuses may result due to the less than adequate protection provided to the federal government on federal construction contracts and the unfair advantage provided to those successful bidders who use individual sureties which do not provide a true and accurate estimate of assets.

Presently, Standard Form 28, Affidavit of Individual Surety which is prescribed for use by FAR 28.202-2, is acceptable for bonding on federal construction contracts. Standard Form 28 requires a certification of sufficiency signed by an official who knows the individual surety and can attest that a personal investigation by the official was made to assure that sufficient assets were listed on the affidavit. The official who signs the certificate of sufficiency is defined in Standard Form 28 as an officer of a bank or trust company, a judge or clerk of a court of record, a United States district attorney or commissioner, a postmaster, a collector or deputy collector of internal revenue, or any other officer of the United States acceptable to the federal contracting agency.

Many of the officials listed in this definition do not have the professional training or experience to make an accurate determination of the value of the assets listed on Standard Form 28. Many of the assets which may be listed on Standard Form 28, including real estate, jewelry and other chattels, are subject to wide and varying degrees of judgment as to their value not only by the official who certifies the sufficiency of the assets but also by the contracting officer who eventually accepts the affidavit, thus providing the government with less than adequate protection.

Use of less than adequate individual surety may also provide a successful bidder with an unfair competitive advantage. Corporate surety performance and payment bonds have a significant cost which, obviously, are reflected in bid prices. Use of individual surety may not only reduce the cost to the successful bidder since there may not be any significant or true assets listed in the affidavit, but the prequalification of the bidder by a knowledgeable body, as occurs with the issuance of performance and payment bonds, does not exist. Consequently, the capability of the successful bidder from a financial standpoint is in question.

AGC requests that Subsection 28.202-2 be amended to alleviate the abuses that may occur by the use of individual sureties. AGC recommends that an approval procedure, similar to that applied by the Treasury Department to corporate sureties, be applied to individual sureties. While not all the Treasury's requirements may be appropriate for individual sureties, the most important such as ready cash, audited statements, and approval to operate within a particular state as a surety, should be applied to individuals. AGC urges you to amend FAR to reflect these recommended changes.

Sincerely,

John W. Sroka
Executive Director
Occupational Divisions

PRESIDENT
*John J. Curtin, Jr.
701 Concord Avenue
Cambridge, MA 02238

SIRST VICE PRESIDENT
*Curtis B. Roberts
Dallas, TX

SECOND VICE PRESIDENT
*[illegible] Cogswell, Jr.
Great Falls, MT

THIRD VICE PRESIDENT
*Stephen F. Dunlap
Auburn, ME

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NASBP

January 6, 1987

Mr. Lawrence J. Rizzi
Chairman
Civilian Agency Acquisition Council
FAR Secretariat
General Services Administration
18th & F Streets, N.W.
Washington, D.C. 20405

Dear Mr. Rizzi:

We have been informed that the Associated General Contractors of America (AGC) recently wrote to you urging that Subsection 28.202-2, Individual Sureties, of the Federal Acquisition Regulations (FAR) be amended.

It has long been the firm contention of this Association, the National Association of Surety Bond Producers, and the AGC is absolutely correct in suggesting, and urging, that the criteria presently applied to corporate sureties for approval to be listed in Treasury Department Circular 570, the list of companies holding certificates of authority as acceptable sureties on federal bonds, should be applied to individual sureties as well.

There have been, and will continue to be, abuses where individual sureties are involved, due to their near total lack of proper regulation.

We concur with the AGC position in this important matter and implore you to amend the FAR regulations so as to subject individual sureties to the same degree of scrutiny and regulation as is presently required of corporate sureties listed in Treasury Department Circular 570.

Sincerely,

Bruce T. Wallace

Bruce T. Wallace

BTW/rb
cc: Officers
bcc: David Johnston; Jon M. Harris; Daniel D. Waldorf; William C. Nelson, Jr.; Lloyd Provost, SAA

NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS
6931 ARLINGTON ROAD, SUITE 308, BETHESDA, MARYLAND 20814 (301) 986-4166

A Bill

To enhance the procurement test authority of the Administrator for Federal Procurement Policy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as "The Procurement Test Act of 1987.

Section 15 of the OFPP Act (41 U.S.C.) Tests of Innovative Procurement Methods and Procedures is amended by striking out subsections (a), (b) in their entirety and substituting in lieu of new subsections (a) through (h).

"Section 15(a) The Administrator may develop innovative procurement methods and procedures to be tested by selected executive agencies. The innovative procurement methods and procedures tested under this subsection, shall be consistent with the policies set forth in section 2 of this Act. In developing any program to test innovative procurement methods and procedures under this subsection, the Administrator shall consult with the heads of executive agencies to --

(1) ascertain the need for and specify the objectives of such program;

(2) develop the guidelines and procedures for carrying out such program and the criteria to be used in measuring the success of such program;

(3) evaluate the potential costs and benefits which may be derived from the innovative procurement methods and procedures tested under such program;

(4) select the appropriate executive agencies or components or executive agencies to carry out such program;

(5) specify the categories and types of products or services to be procured under such program; and

(6) develop the methods to be used to analyze the results of such program.

A program to test innovative procurement methods and procedures may not be carried out unless approved by the heads of the executive agencies selected to carry out such program.

(b) If the Administrator determines that it is necessary to waive the application of any provision of law in order to carry out a proposed program to test innovative procurement methods and procedures under subsection (a), the Administrator shall transmit notice of the proposed program and a test plan to the Congress

together with a declaration that action is necessary to provide that such provision of law does not apply with respect to the proposed program. The notification to Congress shall include a description of the proposed program (including the scope and purpose of the proposed program), the procedures to be followed in carrying out the proposed program, the provisions of law affected and any provision of law the application of which must be waived in order to carry out the proposed program, and the executive agencies involved in carrying out the proposed program.

(c) The notification and test plan submitted to Congress by the Administrator shall be promptly referred to the Committee on Governmental Operations of the House and the Committee on Governmental Affairs of the Senate.

(1) Effective date and publication of procurement test plans.

(A) Except as provided under subsection (e) of this section, a procurement test plan shall be effective upon approval by the President of a resolution (as defined in subsection (e)) with respect to such plan, if such resolution is passed by the House of Representatives and the Senate, within the first period of 90 calendar days of continuous session of Congress after the date on which the plan is transmitted to Congress. Failure of either House to act upon such resolution by the end of such period shall be the same as disapproval of the resolution.

(B) For the purpose of this section -

(i) continuity of session is broken only by an adjournment of Congress sine die; and

(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

(iii) Under provisions contained in a procurement test plan, any provision thereof may be effective at a time later than the date on which the plan otherwise is effective.

(iv) A procurement test plan which is effective shall be printed (1) in the Statutes at Large in the same volume as the public laws and (2) in the Federal Register.

(d) Rules of Senate and House of Representatives on procurement test plans. Subsection e through h of this title are enacted by Congress -

(1) As an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions with respect to any test plans transmitted to Congress and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(e) Terms of resolution:

(1) For the purpose of subsections (d) through (h) of this title, "resolution" means only a joint resolution of the Congress, the matter after the resolving clause of which is as follows: "That the Congress approves the procurement test plan numbered ____ transmitted to the Congress by the Administrator on ___ 19___." The blank spaces therein are to be filled appropriately. The term does not include a resolution which specifies more than one procurement test plan.

(f) Introduction and reference of resolution:

(1) No later than the first day of session following the day on which a procurement test plan is transmitted to the House of Representatives and the Senate under subsection (b), a resolution as defined in subsection (e), shall be introduced (by request) in the House by the chairman of the Government Operations Committee of the House, or by a Member or Members of the House designated by such chairman; and shall be introduced (by request) in the Senate by the Chairman of the Governmental Affairs Committee of the Senate, or by a Member or Members of the Senate designated by such chairman.

(2) A resolution with respect to a procurement test plan

shall be referred to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be. The committee shall make its recommendations to the House of Representatives or the Senate, respectively, within 75 calendar days of continuous session of Congress following the date of such resolution's introduction.

(g) Discharge of committee considering resolution:

(1) If the committee to which is referred a resolution introduced pursuant to paragraph (1) of subsection (f) (or, in the absence of such a resolution, the first resolution introduced with respect to the same procurement test plan) has not reported such resolution or identical resolution at the end of 75 calendar days of continuous session of Congress after its introduction, such committee shall be deemed to discharge from further consideration of such resolution and such resolution shall be placed on the appropriate calendar of the House involved.

(h) Procedure after report or discharge of committee; debate; vote on final disapproval:

(1) When the committee has reported, or has been deemed to be discharged (under subsection (g)) from further consideration of, a resolution with respect to a procurement test plan, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to for any Member of the respective House to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. The motion shall not be subject to amendment, or to a motion to postpone, or a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the resolution shall remain the unfinished business of the respective House until disposed of.

(2) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than ten hours, which shall be divided equally between individuals favoring and individuals opposing the resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A

motion to reconsider the vote by which the resolution is passed or rejected shall not be in order.

(3) Immediately following the conclusion of the debate on the resolution with respect to a procurement test plan, and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a procurement test plan shall be decided without debate.

(5) If, prior to the passage by one House of a resolution of that House, that House receives a resolution with respect to the same test plan from the other House, then --

> (A) The procedure in that House shall be the same as if no resolution has been received from the other House; but
>
> (B) the vote on final passage shall be on the resolution of the other House.

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